

PENNSYLVANIA BUILDING AND
ZONING LAWS—AN ALLEGHENY
COUNTY APPRAISAL

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A STUDY CONDUCTED BY THE SCHOOL OF LAW
OF THE UNIVERSITY OF PITTSBURGH
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THE ALLEGHENY CONFERENCE ON COMMUNITY DEVELOPMENT
PITTSBURGH

1951

[REDACTED]

FOREWORD

In no phase of public administration is teamwork so important as it is in planning for community development. Because planning embraces every aspect of community life, it requires the cooperation of the architect, the engineer, the financier, the political expert, the transportation technician, and the lawyer, to name only a few. In a day when we are preoccupied with advancement in the exact sciences, however, we have tended to overlook the lawyer and his contribution to community progress. Because the execution of public planning depends upon law for its foundation and sanction and because law defines the relationship of private individuals and agencies to their government, the lawyer will always be an indispensable member of the planning team.

In haste we often forget also that one of the fundamental statements of our democracy is that we seek a government of laws rather than a government of men. If we are to insure that the government's powers and the people's rights will continue to be defined by law, we must more consciously develop the legislative framework within which community progress is carried on.

With a recognition of these principles, the Allegheny Conference on Community Development and the School of Law of the University of Pittsburgh have cooperated in accomplishing this survey of the building and zoning ordinances of Allegheny County as they exist under the statutes of the Commonwealth of Pennsylvania. Although many other kinds of regulations figure in community advancement, building construction regulations and zoning ordinances are two of the most operative approaches to a housing program designed to insure a happier, safer and more healthful life. Because building and zoning regulations are widely employed and because they definitely affect the physical visage of a community, they are frequently the keys to the evaluation of an overall program.

The work embodied in this volume was begun early in 1950. At that time the Allegheny Conference on Community Development granted the funds necessary to permit the School of Law of the University of Pittsburgh to undertake the job. Dean Charles B.

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Nutting of the Law School established the Housing Law Research Project and appointed Mr. Craig full-time research fellow to conduct the work under the general supervision of Professor Harold Gill Reuschlein. The original survey lasted five months. At the end of that time, summaries of the survey's conclusions and recommendations were distributed to interested persons and organizations in the county and throughout the State of Pennsylvania.

Because of the interested response which followed the distribution of these summaries, the A. W. Mellon Educational and Charitable Trust has made available to the Allegheny Conference and the School of Law funds sufficient to permit the full study to be printed.

The operation of the survey itself embodied that same sort of cooperation which would make possible the eventual realization of its recommendations. The Pittsburgh Housing Association provided consultation and materials. Contribution to the work was also made by the Institute of Local Government of the University of Pittsburgh. Dozens of municipal solicitors and administrators supplied information with regard to their own municipalities. Materials on building and zoning problems were submitted by the Building Officials Conference of America and the American Iron and Steel Institute, and the Pittsburgh City Planning Commission and officials of the government of Allegheny County also provided assistance.

The completed study represents the contribution which the lawyer can make to housing in its building and zoning aspects. The study deals with the legal problems in a degree of detail found only in one or two existing publications on the subject; yet it has been written so that it can be understood by non-lawyers.

So far as the study deals with fields other than the law, many of the recommendations have been obtained from experts in the particular field concerned. The principal recommendations of the study are a fusion of legal opinion with that of engineering and planning. These recommendations, that building regulation be made uniform through the adoption of model codes and that zoning regulations be integrated on a regional basis, have for some time been advocated by building and planning authorities. However, this

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study reexamines these programs in the light of the precise law of statutes and cases and gives them approval from the legal standpoint as well.

The sponsors of the study believe that this publication will find utility in the following applications:

1. *A legal handbook for the officials of individual municipalities:* As such it will be most useful to the 128 Allegheny County municipalities outside Pittsburgh, but it will also be nearly as valuable to all small and medium-size municipalities in Pennsylvania because, although it presents the Allegheny County pattern and uses Allegheny County ordinances as illustrations, all the legal conclusions and recommendations are applicable throughout the Commonwealth. Local officials will find the study helpful (a) in the improvement of the content and administration of existing building and zoning ordinances, (b) in the drafting and enactment of entirely new ordinances, and (c) for participation in county-wide or regional action.

2. *A blueprint for county-wide or regional action:* This facet of the study will not only serve the local officials who wish to participate in a regional program but also the county or regional officials who direct such a broader program and the private groups who aid and encourage it.

3. *A reference volume on applicable state legislation:* Because the study describes the statutes which underly building and zoning regulation, it will serve legislators and others who desire to re-examine the existing pattern of statutes.

4. *A textbook for lawyers and students:* Because the study does deal with statutes and case law as well as with the examination of the ordinances of a particular area, it will be useful to practicing attorneys and students of law and political science.

The sponsors of the study are convinced that a survey of Allegheny County will have instructive value beyond the borders of that county alone. Allegheny County today continues to exhibit the same many-sided nature which prompted Abraham Lincoln to refer to it as "The State of Allegheny." Within the county limits there are rural districts together with the great industrial bustle of Pittsburgh and its steel-making environs. The 129 municipalities

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in the county range in size from Pittsburgh down to tiny townships and boroughs; among their residents every sociological group is represented. A survey of Allegheny County, then, has significance not only for its own residents but also for those who are dealing with similar problems elsewhere in the nation, whether those problems appear in a small relatively self-sufficient municipality or arise within the environment of the interdependent relationships of a metropolitan area.

PARK H. MARTIN, *Executive Director*
The Allegheny Conference on
Community Development

Pittsburgh, Pa.
August 1, 1951

Note: This study has been accepted but not yet approved or adopted by the Allegheny Conference on Community Development. Its findings and recommendations are those of its author. The Conference at this time sponsors the publication of the study so that it may serve as an educational basis for community planning.

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PREFACE

This survey report represents an effort to present the legal side of housing in Allegheny County. It is centered about remedial housing regulation and does not touch upon the public housing programs which are governed by such legislation as the Pennsylvania Housing Authorities Act and the Urban Redevelopment Authorities Act. The chief type of remedial ordinances which have been surveyed are the building and zoning codes. Miscellaneous health, nuisance, garbage and sewage ordinances have been examined but they do not present a pattern sufficiently unified to permit a county-wide survey of them in a brief time.

The main classes of local ordinances about which this report centers, the building and zoning ordinances, have been examined intensively. Because the Pennsylvania legislature in 1949 required all such ordinances to be publicly filed or recorded and because the Pittsburgh Housing Association provided the Project with a convenient file of many Allegheny County ordinances, it has been possible to examine every such ordinance in the county and to analyze completely a substantial portion of them. The emphasis of the material in the report is placed outside the City of Pittsburgh in view of the fact that Pittsburgh has a relatively new building code and is considering the enactment of an entirely revised zoning code. However the legal and administrative provisions of the Pittsburgh Building Code and that city's proposed zoning code have been analyzed and are discussed in the report as bases for comparison with the codes of the outlying municipalities.

The approach to the Pennsylvania and Allegheny County problems here surveyed is principally from the legal aspect. During the progress of the work however, information was obtained on aspects of local enforcement which ordinarily would not be a matter of concern for the courts or the legislature. Thus an attempt has been made to arrive at specific practical findings and to draw recommendations on a plane somewhat broader than a purely legal one. Although the recommendations, which are summarized in the appendix to this volume, are in the main related to purely legal matters, they do go further than merely being suggestions of means

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by which conformity to existing laws might be obtained. They concern themselves with the development of a new system of regulation which would be productive not only of legal conformity but also of practical, social and economic benefit.

The writer regrets that sufficient time was not available to permit a more detailed examination of the legal facets of administrative procedure, especially as applied to large cities. However, administrative procedure and its due process aspects represent a field sufficiently large to deserve an entirely separate study. Indeed the problems of administrative procedure are common to the executive branches at all levels of government, Federal, state, and local, and in connection with all kinds of regulation. Only a few problems of administrative procedure are indigenous to building construction and zoning regulation; those matters which are peculiar to the building and zoning field have been dealt with in the report.

No recommendations have been made which are entirely unrelated to the legal aspects; for example, enforcement problems have been presented only if they are in some way related to the written law; matters such as the incidence of administrative favoritism have not been included in the scope of the work.

Although this study was originally finished in the summer of 1950, all aspects of it were revised and brought up-to-date at the time of publication in 1951. Only a small portion of the material in the report is likely to be affected by the amendment of the underlying statute law; however, the reader should keep in mind that those conclusions and recommendations which depend upon the statute law as it existed at the time the report was written can be affected by action taken at subsequent sessions of the Pennsylvania legislature. The rest of the material in the report should remain appropriate for a long period of time because judicial doctrines, administrative practices, and legislative drafting techniques are little affected by the years.

In the composition of this report the assistance rendered by the faculty and research fellows of the University of Pittsburgh School of Law was indispensable. Grateful acknowledgments are also due to Dr. Max Nurnberg of the Allegheny Conference on Community Development and to Mr. William Willis of the Institute

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of Local Government in the University of Pittsburgh for their aid in determining the scope of the work; to Mr. Wilson Borland and Mr. Ralph Harkins of the Pittsburgh Housing Association for their suggestions and their file of ordinance copies; to Mr. John A. Bailey, Borough Manager of Edgeworth, for his comments on the *Abridged Building Code* of the Building Officials Conference of America; to the many municipal officials of Allegheny County who willingly provided information about their own communities; to Mrs. Norma Rudert for her patient and efficient secretarial work in connection with the original composition of this study; to Miss Peggy Grafton and Miss Martha Allison for their stenographic assistance in revising it for publication; and to the author's wife Ella for her cheerful aid in proofreading.

Of great help in the solution of specific problems were the writings of Mr. Charles S. Rhyne, Editor of the National Institute of Municipal Law Officers; Mr. E. C. Yokley, City Attorney of Nashville, Tennessee; Mr. James Messer, Jr., City Attorney of Tallahassee, Florida; and Mr. Howard Vermilya of the American Public Health Association.

DAVID W. CRAIG, *Research Fellow*
University of Pittsburgh School of Law

Pittsburgh, Pa.
August 1, 1951

INTRODUCTION: THE LEGAL FOUNDATION OF LOCAL GOVERNMENTS' REGULATORY POWERS

An understanding of this report would not be complete unless the broad rules of local government law which courts follow were presented along with it. To this end, then, a brief sketch of the approach which courts take when determining the legality of local regulation follows:

Pennsylvania has in the past not been a home-rule state; that is, Pennsylvania municipalities have not had the power of formulation and adoption of their own charters, a power which ordinarily is framed to permit local governments to be supreme with regard to matters of purely local concern. Although the Pennsylvania Constitution permits the legislature to grant home-rule powers to the municipalities, the legislature has not yet effectuated the constitutional provision by enabling legislation as far as second class cities or lesser classes of municipalities are concerned. Today the major home-rule act in force is the Act of April 21, 1949, P. L. 665; 53 P. S. 3421.1, *et seq.*, which grants limited home-rule powers to first class cities (Philadelphia).

Where municipalities do not have the benefit of home-rule powers, they have, generally speaking, only such powers as are granted by the legislature. Pennsylvania courts have uniformly held that the powers of a municipal corporation are confined to (1) powers expressly granted, (2) powers necessarily incident to the express powers, and (3) those few powers which are indispensable to the declared objects and purposes of a municipal corporation. Usually the power given the local governments is a limited derivative power; that is, although local governments derive from the legislature the power to enact ordinances controlling a certain subject matter, the power is circumscribed by restrictions. Often the municipalities are given the residuary power to regulate matters affecting the "general welfare" of the community, provided their regulations do not conflict with former or future statutes laid down by the legislature.

The legislature may create a program so comprehensively regulating particular matters that, by implication, the municipalities

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are excluded from enacting ordinances affecting the field. The situation is described as a "pre-emption" of the field by the legislature; it may be accomplished by an express declaration as well as by implication.

But where the legislature has not pre-empted a field and where the local units have a limited derivative power, the local governments and the legislature may regulate the field concurrently so long as the regulations on the two levels do not conflict. If a local government has neither home-rule powers nor an absolute derivative power, the *policy laid down by the legislature will prevail in any conflict*, whether the subject matter involved is of local or state-wide significance.

The question of the existence of a conflict has been the subject of extensive consideration by the courts. The clearest example of a conflict occurs when the local unit applies requirements which are less stringent than those imposed by the legislature. A duplication by a municipality of a state-wide licensing requirement may produce a conflict; theoretically, identical regulation by local unit and legislature is conflicting because a jurisdictional clash may result. On the other hand, when a local government sets up more stringent requirements than the legislature, the courts often will not find a conflict if the more stringent local requirements are reasonable ones. Whether or not a conflict exists is determined by the courts on the basis of the particular facts involved in each case; generalizations are difficult.

The method of analysis of problems involving the relation of local unit powers to the legislature in a non-home-rule state may be summarized as follows: First, discover whether the local units possess any powers over the field at all. The legislature may have granted no powers in the first instance or it may have demonstrated an intention to pre-empt a field which the local government could have occupied under its general powers. However, if the local units do have the power to regulate certain subject matter, then consider whether or not the exercise of that power is in conflict with the power residing in the legislature. If a conflict does exist, the legislature's policy prevails.

PART ONE
BUILDING CONSTRUCTION REGULATION

TABLES

Explanation of Tables

The following tables, which are used to preface the discussion of building codes in this Part, appear in a group here, rather than in connection with chapters to which they may be appropriate, for a purpose. They are designed to present a panoramic view of the broad sweep of the building code problem in the county. The findings presented in the tables are of moment themselves, as findings, as conclusions bearing upon the particular factors which are considered; but in addition, the findings are intended to serve secondarily as a reminder of the breadth of building regulation in Allegheny County. We are not here dealing with one city, but with 129 municipalities of widely varying size and economic environment, a group of communities in which there is even some variance in mores and aesthetic attitudes. The tables survey not one law but 53 ordinances drafted at different times over a period of 35 years and administered over that period by scores of different officials.

The desirability and need for uniformity of building construction regulation is discussed in Chapter III of this Part; the facts are that uniformity is not now present and cannot be achieved quickly. We will, for some years to come, be dealing with a patchwork of construction regulation; the following tables serve, it is hoped, both to demonstrate the existence of that patchwork and to point up the ways to improvement.

In order to discover the general patterns of existence, scope, and age of the building codes, population statistics have been used. The real effect on housing of the countywide pattern of regulation cannot be seen, of course, by merely making comparisons based on the number of municipalities which have adequately modern codes—and the like; the variance in size of municipalities prevents a realistic comparison. In the construction of the tables, population was chosen as a basis of comparison in order to demonstrate the effect of building code coverage on social units. Population figures are based on 1950 census estimates.

Because of the fact that the population-dwelling unit ratio

(average family size) tends to be the same for various groups of municipalities when, as here, a fairly large number of municipalities are contained in a group, population percentages and the dwelling-unit percentages turned out to be very similar; therefore, additional comparisons based on dwelling-units are not included in the tables.

The Project also attempted to construct tables making comparisons based on the number of structures in each municipality in order to demonstrate the effect of building code coverage on the enforcement unit. Such percentages would have provided a picture of the legal aspect and would supplement the social aspect picture presented by the population percentages. However, prolonged search failed to produce any basic data on the number of structures in specific Allegheny County municipalities.

The comparisons made in the tables on the basis of mere numbers of municipalities serve still another purpose; having discovered by reference to population statistics that a specific defect (obsolescence, for example) afflicts the ordinances which regulate a large proportion of the county's housing units, the comparisons based on number of municipalities tend to help point out the size of the job of improvement, how many councils or commissioners must convene, how many citizens' groups must be consulted in order to bring about a satisfactory state of building regulation under the statutory authority presently available to municipal officers.

In all except Table E, a distinction has been made between the pattern existing in the county as a whole and in that part of the county outside the boundaries of the City of Pittsburgh. Pittsburgh has a relatively recent (1947) and carefully planned building code which may well evolve into a model of its kind. For the purposes of the rough evaluations made by these tables, to consider the county as a whole would give a distorted picture of the non-Pittsburgh area because the findings would be heavily weighted by the fact that half the county population resides in Pittsburgh, which at least does have a building code, a recently drafted code, and one which covers most of the broad field which building codes ideally should encompass. Thus, as the tables demonstrate, the picture in the outlying communities, considered as an entire area, is more gloomy than a glance at the whole county would indicate.

TABLE A
BUILDING CODES EXISTING IN ALLEGHENY COUNTY AS OF JUNE 30, 1951

	ALLEGHENY COUNTY INCLUDING THE CITY OF PITTSBURGH		ALLEGHENY COUNTY EXCLUDING PITTSBURGH	
	Number of Municipalities	Percentage of the Number of All County Municipalities (129)	Percentage of Total County Population (1950) (1,508,255)	Percentage of Total County Population (1950) Excluding Pittsburgh (834,492)
MUNICIPALITIES ENFORCING BUILDING CODES	53*	41%	76%	57%

*For lists of the names of municipalities now enforcing building codes, see the pages following Table B.

BUILDING REGULATION

TABLE B
SCOPE OF EXISTING BUILDING CODES, JUNE 30, 1951

ALLEGHENY COUNTY INCLUDING PITTSBURGH		ALLEGHENY COUNTY EXCLUDING PITTSBURGH	
	Percentage of Total Number of Municipalities Enforcing Codes (53)	Percentage of Total Population (1950) of Municipalities Enforcing Codes (1,146,377)	Percentage of Total Population (1950) of Municipalities Enforcing Codes, Excluding Pittsburgh (472,614)
GROUP 1:			
BRIEF CODES—CHIEFLY			
FIRE PREVENTION, SAFETY	13	25%	16%
GROUP 2:			
GENERAL PURPOSE CODES, BRIEF	19	36%	26%
TOTALS, GROUPS 1 & 2—			
CODES OF INADEQUATE SCOPE	32	61%	42%
GROUP 3:			
GENERAL PURPOSE CODES, COMPLEX	21	39%	57%

See the following pages for a fuller description of each Group and lists of the municipalities falling into each Group.

Description of Groups in Table B

GROUP 1: *Fire Prevention, Safety*

The codes classed under this heading concern themselves for the most part with fire prevention and occasionally with a few aspects of structural safety. A couple of them merely describe fire limits within which structures made of combustible materials are prohibited, and hence such codes perform a function ordinarily handled by zoning ordinances. All of them are very short (15-30 sections) and hence *prima facie* are of insufficient scope to cover all aspects of construction. Some contain a general section on "Unsafe Buildings," and a few set forth very general requirements for foundations, footings, and walls. The accent upon fire prevention is evidenced by the predominance of sections dealing with wooden girders, chimneys, and fireplaces. In this group are the oldest ordinances in the county, a fact which supports the statement that historically fire prevention was the earliest justification for the enactment of building and zoning ordinances. As might be expected, a greater proportion of this group is administered without a building inspector than is either of the other two groups.

Municipalities in Group 1:

- | | |
|----------------------------|---|
| 1. Braddock Borough | 8. Mount Oliver Borough |
| 2. Braddock Hills Borough | 9. North Versailles, First Class Township |
| 3. Cheswick Borough | 10. Scott, First Class Township |
| 4. East McKeesport Borough | 11. Springdale Borough |
| 5. Forest Hills Borough | 12. Tarentum Borough |
| 6. Glenfield Borough | 13. Verona Borough |
| 7. Green Tree Borough | |

GROUP 2: *General Purposes, Brief*

The distinction between this Group and Group 1 is a narrow one. Here requirements relating to fire prevention are much in evidence but not as predominantly as in Group 1. The broader scope is demonstrated by sections dealing with structural requirements. Virtually none of these incorporate national material test standards by reference, but most set forth brief general standards verbatim. Some of the ordinances in this group have general

electrical and plumbing requirements. The administrative provisions in this Group are fuller, and most provide for a building inspector.

Municipalities in Group 2:

- | | |
|----------------------------------|---------------------------------------|
| 1. Avalon Borough | 11. Heidelberg Borough |
| 2. Baldwin, First Class Township | 12. Leetsdale Borough |
| 3. Ben Avon Borough | 13. Marshall, Second Class Township |
| 4. Bradford Woods Borough | 14. McCandless, Second Class Township |
| 5. Crafton Borough | 15. Oakmont Borough |
| 6. Dormont Borough | 16. Osborne Borough |
| 7. Emsworth Borough | 17. Shaler, First Class Township |
| 8. Edgewood Borough | 18. Swissvale Borough |
| 9. Etna Borough | 19. West View Borough |
| 10. Glassport Borough | |

Comment:

The ensuing text will point out that this Group is composed of ordinances which are of inadequate scope. In view of this conclusion, it is material to note that the list of municipalities above contains a high percentage of communities which are in the upward stage of housing growth.

GROUP 3: General Purposes, Complex

The word "complex" as used in describing this group is not meant to carry a derogatory connotation. For the regulation of the complex business of housing construction, complex ordinances are required. (As will be pointed out, complexity and length need not impair the usefulness of a code if it is carefully drafted and provided with proper means of reference. Most of this Group have a table of contents; other desirable means of reference are described in Chapter V of this Part.) The codes in this Group in the main employ material test standards for the guidance of inspector and builder. Many of them outline areas in which the enforcement officials may exercise discretion. Some of the codes here also make distinctions based on the type of occupancy, a characteristic less prominent in Group 2. However, the inclusion of a code in this

Group is not meant as an unqualified endorsement of it; many of them are almost entirely obsolete and some are very poorly drafted as far as form and technical and legal content are concerned. The grouping here is based on the scope of subject matter covered, as compared with the two preceding Groups, rather than upon over-all superiority.

Municipalities in Group 3:

- | | |
|---------------------------------------|-----------------------------------|
| 1. Bellevue Borough | 11. Munhall Borough |
| 2. Bethel Borough | 12. O'Hara Township |
| 3. Brentwood Borough | 13. Penn, First Class Township |
| 4. Clairton, Third Class City | 14. Pittsburgh, Second Class City |
| 5. Duquesne, Third Class City | 15. Rosslyn Farms Borough |
| 6. Edgeworth Borough | 16. Sewickley Borough |
| 7. Fox Chapel Borough | 17. Thornburg Borough |
| 8. Kilbuck, Second Class Township | 18. West Mifflin Borough |
| 9. McKeesport, Third Class City | 19. Whitehall Borough |
| 10. Mt. Lebanon, First Class Township | 20. White Oak Borough |
| | 21. Wilkinsburg Borough |

TABLE C
AGE OF EXISTING BUILDING CODES, JUNE 30, 1951

	ALLEGHENY COUNTY INCLUDING CITY OF PITTSBURGH		ALLEGHENY COUNTY EXCLUDING PITTSBURGH
	Number of Municipalities	Percentage of the Total Number of Municipalities Enforcing Codes (53)	Percentage of Total Population (1950) of Municipalities Enforcing Codes Excluding Pittsburgh (472,614)
MUNICIPALITIES WITH CODES TEN YEARS OLD OR LESS	20	38%	72% 32%
MUNICIPALITIES WITH CODES MORE THAN TEN YEARS OLD	33	62%	28% 68%

TABLE D

BUILDING CODES OF ADEQUATE SCOPE TEN YEARS OLD
OR LESS

The table presented here is the product of merging the two favorable classes from the two preceding tables; in Table B, Group 3 shows the number and population of municipalities which have building codes sufficiently broad in scope to cover the complex problems of construction regulation; in Table C, the first horizontal group shows the number and population of municipalities with building codes ten years old or less. From a general view, only those codes which fit into both these favorable classes hold even a promise of being sufficiently modern and broad to regulate present-day building properly. The textual discussion in this Part will point out the basis for this conclusion.

ALLEGHENY COUNTY INCLUDING THE CITY OF PITTSBURGH

Number of Municipalities Whose Codes Meet Both Standards	Percentage of All Municipalities in County (129)	Percentage of Municipalities Enforcing Codes (53)	Percentage of Total Population (1950) of Allegheny County (1,508,255)
13*	10%	25%	53%

ALLEGHENY COUNTY EXCLUDING THE CITY OF PITTSBURGH

Number of Municipalities Whose Codes Meet Both Standards	Percentage of All Municipalities in County Excluding Pittsburgh (128)	Percentage of Municipalities Enforcing Codes Excluding Pittsburgh (52)	Percentage of Total Population (1950) of Allegheny County Excluding Pittsburgh (834,492)
12	9%	23%	14%**

*The thirteen municipalities whose codes meet the rough standards of scope and newness are: Bethel Borough, Brentwood Borough, Edgeworth Borough, Kilbuck Township, Penn Township, Pittsburgh, Rosslyn Farms Borough, Sewickley Borough, Thornburg Borough, West Mifflin Borough, Whitehall Borough, Whiteoak Borough and Wilkinsburg Borough.

**This is the most significant figure of all.

TABLE E

TABULAR ANALYTICAL SUMMARY OF BUILDING CODES IN
ALLEGHENY COUNTY OUTSIDE PITTSBURGH

The tabular analysis presented here is intended to provide a panoramic view of the content of most of the building codes in the outlying municipalities of Allegheny County. To break down and discuss every single section of every building ordinance in the county would not be possible in a short period of time, nor would it be productive of much more information than is presented here; the product would be repetitive because a great number of sections are common to more than one code. The method used here has been settled upon as most efficient. Although there are 52 building ordinances being enforced (as of June 30, 1951) by the outlying municipalities, all of which were examined for purposes of the textual discussion in the latter part of this Part One, this summary in Table E deals with 38 out of the 52. In order to arrive at a fair cross-section for this Table E, its 38 ordinances are composed of 6 of the 13 ordinances in Table B's Group 1, 15 of the 19 ordinances in Group 2, and 17 of the 20 ordinances which, excluding Pittsburgh, constitute Group 3. An examination of these figures will show that, if anything, the sampling used here is overweighted on the side of the more comprehensive ordinances. As the title indicates, Pittsburgh's code is not among those included in this Table.

The tabulations shown in this summary will be referred to in the textual discussion in this Part.

The Elements in the summary are presented in what is thought to be a logical order, but the types within each Element are not presented in any order of importance or desirability. The full meaning and significance of each Element and type is not set forth here because they are fully discussed and explained in the textual portion of this Part.

The percentages used are percentages of the number of ordinances studied (38). In five of the elements (V, VII, VIII, X and XI) the total number of units tabulated exceeds 38 and the total of percentages exceeds 100% because some ordinances contain two or more sections which fit under more than one of the types within a single Element.

ELEMENT I. AGE OF CODE (In this element codes were rated according to the date of enactment of the ordinance which supplies the main body of the code; the dates of amendments which did not change the basic nature of the code were not considered.)

	Number of Municipalities	Percentage of Ordinances Analyzed (38)
1. Less Than Five Years Old	9	23.2%
2. Five to Ten Years Old	4	10.5%
3. Eleven to Fifteen Years Old	0	
4. Sixteen to Twenty Years Old	7	18.4%
5. Twenty-one to Twenty-five Years Old ..	12	31.6%
6. Over Twenty-five Years Old	6	15.8%

ELEMENT II. SOURCE

	Number of Municipalities	Percentage of Ordinances Analyzed (38)
1. National Model	2	5.3%
2. State Model	0	
3. Modeled on Code of Other Allegheny County Municipality	23	60.5%
4. Modeled on Code of Other Pennsylvania Municipality	1	2.6%
5. Original	5	13.2%
6. Unknown	7	18.4%

ELEMENT III. EXTENT OF CHANGES AND METHOD OF
KEEPING CODE UP TO DATE

	Number of Municipalities	Percentage of Ordinances Analyzed (38)
1. Provision for Complete Revision	0	
2. Recodification of Amendments Periodic- ally	2	5.3%
3. No Changes, No Provision for Them ...	26	68.4%
4. Minor Amendments, Few	8	21.1%
5. Minor Amendments, Many	1	2.6%
6. Extensive Amendments, Uncodified	1	2.6%

ELEMENT IV. ORGANIZATION OF CODE; FORMAT (In this element the method of presentation of the technical requirements was considered. Examples of occupancy classifications are: "Single-family Residences," "Apartment Houses," "Light Manufacturing,"

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etc. Examples of subject matter classifications are: "Walls, Foundations, Footings and Piers," "Reenforced Concrete Construction," etc.)

	Number of Municipalities	Percentage of Ordinances Analyzed (38)
1. According to Occupancy	0	—
2. Chiefly According to Occupancy, Partly According to Subject Matter	5	13.2%
3. Chiefly According to Subject Matter, Partly According to Occupancy	23	60.5%
4. According to Subject Matter	6	15.8%
5. No Organizational Pattern	4	10.5%

ELEMENT V. MEANS OF REFERENCE WITHIN CODE

	Number of Reference Methods	Percentage of Ordinances Analyzed (38)
1. Table of Contents, Appendix and Index	0	—
2. Table of Contents and Appendix	2	5.3%
3. Table of Contents and Index	2	5.3%
4. Table of Contents Only	5	13.2%
5. Index Only	0	—
6. No Means of Reference or Indexing ...	28	73.7%
7. Cross-Reference to Other Ordinances ..	10	26.3%

ELEMENT VI. TECHNICAL CONTENT AND BASIS OF CODE

	Number of Municipalities	Percentage of Ordinances Analyzed (38)
1. Performance Provisions, Detailed	4	10.5%
2. Performance Provisions, General	4	10.5%
3. Specification Provisions, Detailed	14	36.8%
4. Specification Provisions, General	2	5.3%
5. Very General Nature, Brief	8	21.1%
6. Both Specification and Performance Pro- visions	6	15.8%

ELEMENT VII. STANDARDS FOR EVALUATION OF STRUCTURAL METHODS AND MATERIALS

	Number of Sections	Percentage of Ordinances Analyzed (38)
1. Standards Incorporated by Reference, Provision for Changes by Administrators	4	10.5%
2. Standards Incorporated by Reference, No Provision for Changes	17	44.8%
3. Standards Recited in Full, Provision for Changes	0	—
4. Standards Recited in Full, No Provision for Changes	23	60.5%
5. Use of Standards Not Required, Merely Made Evidence of Safe Practice	0	—
6. Fundamental Standards Stated, Within Administrative Discretion	6	15.8%
7. No Mention of Standards	1	2.6%

ELEMENT VIII. FLEXIBILITY, ADAPTABILITY TO NEW MATERIALS AND METHODS

	Number of Sections	Percentage of Ordinances Analyzed (38)
1. Flexible but Definite	8	21.1%
2. Occasional Instances of Flexibility	18	47.4%
3. Too Indefinite	4	10.5%
4. Too Rigid	10	26.3%

ELEMENT IX. ADMINISTRATIVE PROCEDURE

	Number of Municipalities	Percentage of Ordinances Analyzed (38)
1. Building Permit and Occupancy Permit Required, Building Inspector	8	21.1%
2. Building Permit, Building Inspector ...	28	73.7%
3. Building Permit, No Building Inspector .	2	5.3%

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ELEMENT X. ADMINISTRATIVE DISCRETION

	Number of Sections	Percentage of Ordinances Analyzed (38)
1. Power to Amend and Modify Code	6	15.8%
2. Broad, General Discretionary Powers ..	8	21.1%
3. Occasional Examples	22	57.8%
4. Duty to Suggest Amendments to Legisla- tive Body	4	10.5%
5. No Discretionary Powers	4	10.5%

ELEMENT XI. ENFORCEMENT; PENALTIES, REMEDIES

	Number of Sections	Percentage of Ordinances Analyzed (38)
1. Fine or Imprisonment, Non-Conforming Buildings Abatable as "Nuisance" at Expense of Owner, Provision for Lien in Favor of Municipality for Cost of Abatement	5	13.2%
2. Same—No Provision for Lien	0	—
3. Same—No Provision for Lien, Abate- ment Not at Expense of Owner	13	34.2%
4. Fine or Imprisonment Only	17	44.7%
5. Fine Only	3	7.8%
6. Fines Expressly Made Recoverable by Summary Proceedings	22	57.8%

CHAPTER I

STATUTORY POWER TO ENACT BUILDING REGULATIONS

A. General

The first consideration in examining any building ordinance or, as in this study, a pattern of building regulation in a specific area is the legal environment within which those ordinances must be enacted. A common but erroneous belief is that building codes are enacted on the basis of the "police power" inherent in the local municipality; this impression is erroneous because, although the police power is the ultimate basis for such regulation, the police power is inherent in the state and not in the local municipality. Where general home-rule is not in force, in order for a local unit to exercise those governmental functions which are implied by the term "police power," it must have specific statutory authority, legally termed a "delegation" of the state's police power to the local unit.

The statutory basis for building and construction regulation must be considered for at least two reasons. First, the existing pattern of local regulation is valid and will be upheld by the courts if litigation ensues, only where that local regulation conforms to the statutory authority conferred by the General Assembly. The primary test of the effectiveness of building codes is to see whether the powers assumed by the local government are ones susceptible to attack on the basis of their nonconformity to statutes or constitutional provisions. Although an excessive assumption of powers by local authorities often goes undetected for a long time because persons governed fail to raise objections in court, the crucial issues, on account of their importance, will be the ones which find their way into litigation. If the local ordinances cannot meet a judicial test, that failing should be discovered before critical legal questions affecting a large portion of the community or involving large amounts of money and property arise.

A second reason for beginning with the statutes to evaluate the county pattern of building ordinances is to determine what potentialities the local governments have not entirely exhausted. Local

ordinances will fail to employ all the means which the legislature has granted more frequently than they will exceed the limits of the legislature's grant.

In this chapter only the critical problems appearing in the present statutory pattern will be considered. The actual extent to which local building ordinances in Allegheny County have exceeded or have failed to employ all the means allowed by the statutes will be discussed in later chapters. Also unnecessary here is a recitation of all the statutory provisions which apply to the building regulation powers of the various classes of municipalities.

B. Scope of Permissible Subject Matter of Regulation

In general, the Pennsylvania legislature today has granted sufficiently broad powers of regulation insofar as the subject matter which may be regulated is concerned. For example, the statute upon which the second class city ordinances are based states that such municipalities

"... are hereby authorized and empowered to enact and enforce suitable ordinances to govern and regulate the construction, alteration, repairs, occupancy, maintenance, sanitation, lighting, ventilation, water supply, toilet facilities, drainage, use and inspection of all buildings and the sanitation of land appurtenant thereto. . . ."¹

The scope of powers conferred upon the other classes of municipalities is equally broad.

However, in spite of the adequacy of legislative grants of power, the facts are that a great many municipalities in Allegheny County have failed to embrace in their building ordinances all the matters which they by statute are now empowered to cover. The scope of subject matter now covered by the existing pattern of local regulation is discussed fully in Section A of Chapter IV of this report. Part of the reason for the local units' failure to regulate all the matters which they now may control is that many of the ordinances in Allegheny County were adopted before the statutes now in force were enacted by the legislature. For example,

¹ Act of April 14, 1937, P. L. 313, § 1, as amended June 20, 1939, P. L. 474, § 1; 53 P. S. 2224.

as shown in Element I of Table E at the beginning of this Part, only about 34% of the building ordinances now in force in Allegheny County have been enacted within the last 15 years. All the others were adopted before 1936 and hence came into being before the enactment of the statute of 1937 which is quoted above. Thus, by comparing the breadth of subject matter which the statutes now allow to be regulated with the area which is actually at present regulated by the older ordinances in the county, we can see the first of many reasons why some Allegheny County municipalities should consider seriously the adoption of entirely new building ordinances which use more fully the possibilities afforded by the legislature.

C. Adoption of Building Codes by Reference

In order to offset limitations of time, money, and personnel, many municipalities throughout the country which desire building codes of adequate scope are considering adopting one or the other of several standard codes promulgated by national associations interested in the problem. The adoption of standard codes is most convenient when a municipality has power from the state to adopt such codes by reference to their title rather than by a verbatim enactment. This procedure reduces the time and expense which would otherwise be spent by local councils and commissioners in the enactment and publication of building codes.

Here we shall examine only the general scope of Pennsylvania statutory authority relating to adoption by reference. In Section D of Chapter III other aspects of this same procedure are taken up in the consideration of potential sources of new building codes.

1. *Pennsylvania Statutes*

Pennsylvania municipalities are fortunate in comparison to those in some other states because the Pennsylvania General Assembly has in recent years given powers which, as far as their scope is concerned, are wholly adequate to permit adoption by reference. An example is presented by the law applicable to third class cities, which says that

"The building ordinance may adopt any standard building code published and printed in book form, covering any or all

of the above items, without incorporating such code in the ordinance; or any city may enact any such building code as its building ordinance. In either event, the building ordinance or code need not be advertised after passage, but notice of its consideration in such reasonable detail as shall be in conformity with a uniform form to be prepared or approved by the Department of Labor and Industry shall be published [in the same manner that other ordinances are published]. . . . Not less than three copies of the building ordinance adopted by council shall be made available to public inspection and use during business hours for at least three months after its adoption. . . ."²

The words of the statutes applicable to all other classes of municipalities are virtually identical with these. For the most part these provisions are admirable ones. First, the very fact that they permit adoption by reference serves to encourage the use of uniform national codes by municipalities which are so small and limited in resources that an original code devised locally would be likely a poorly drafted one. Second, as well as permitting enactment by reference the statutes also permit publication by reference, yet at the same time insuring publication which will apprise the inhabitants of the nature of the code adopted and places where full copies may be found. (The requirement that publication be made pursuant to a form approved by a state agency is discussed under the next sub-heading.) Permission to publish a long building code by means of a brief notice is indeed important beyond mere considerations of convenience; as Miss Anne X. Alpern, City Solicitor of Pittsburgh, has pointed out, the cost of advertising the full text of long performance codes in a newspaper would bankrupt most cities.

The provisions which govern adoption by reference in boroughs were amended in 1951³ to add an express statement that plumbing codes, as well as building codes, may be adopted by reference.

The undesirable aspect of these statutes is that, except in the case of boroughs, the building ordinances adopted by reference must be made available for public inspection and use for only three months after their adoption. The Borough Code section re-

² Third Class City Code, § 4131, as revised by Act No. 164, 1951, § 41.

³ Borough Code, § 1202 LXI, as amended by Act No. 217, 1951, § 1; 53 P. S. 13372.

quires copies to be made available without time limit. All the statutes should place upon municipalities the duty of making regulations known and available to the people so long as such regulations are in force.

2. *Requirement of Approval by State Agencies*

With respect to the part which state agencies play in the adoption of building codes by reference, the pattern of statutory powers applicable to all classes of municipalities in Allegheny County is slightly defective.

Like the third class city law quoted above, the statutes applicable to second class cities and second class townships⁴ permit the local unit to enact a standard building code if it comes within the general statutory powers and requires that the form of publication of such an enactment be a uniform one "prepared or approved by the Department of Labor and Industry." First class townships are under an exactly similar requirement, the requirement that the Department of Labor and Industry must approve the form of publication.⁵

In the case of boroughs, however, the situation is a little different. The act of 1937, which now (so far as adoption by reference is concerned) applies only to second class cities, formerly also applied to boroughs. The enforcement provisions of that statute may still apply to boroughs. See Section D in this chapter, *infra*. As stated above, that act required only the form of publication to be approved, which function was to be performed by the Department of Labor and Industry. However, the Project's study of statutes indicates that the act of 1937 is impliedly repealed at least in part by certain provisions of the Borough Code. The Borough Code as revised in 1947 changes the procedure. It states:

"The provisions of the ordinance need not be advertised or recorded as in other cases, but may be supplied by reference

⁴ Second class cities: Act of April 14, 1937, P. L. 313, § 1, as amended June 20, 1939, P. L. 474; § 1; 53 P. S. 2224.

Second class townships: Act of May 1, 1933, P. L. 103, § 702 Cl. LI, added by Act No. 85, 1951, § 8; 53 P. S. 19093-702 Cl. LI.

⁵ Act of June 24, 1931, P. L. 1206, Art. XV, § 1502, as amended June 20, 1939, P. L. 477, § 1, May 27, 1949, P. L. 1955, § 31; 53 P. S. 19092-1502, Cl. XIX.

to a standard building code approved by the Department of Internal Affairs of the Commonwealth. . . ."⁶

This same section also states that the form of publication shall be prepared or approved by the Department of Internal Affairs. It thus differs from the act of 1937 in two respects. It transfers, as to boroughs, the function of approving forms of publication from the Department of Labor and Industry to the Department of Internal Affairs; it also imposes a new requirement, the requirement that the standard building code itself must be one approved by the Department of Internal Affairs.

These changes made as to boroughs in 1947 were not followed through when the Second Class Township Code was amended also in 1947 and 1951 nor when the First Class Township Code was amended in 1949. The discrepancies thus wrought are apparent. All classes of municipalities except boroughs are to publish their building ordinances by means of a form approved by the Department of Labor and Industry; in the case of boroughs the form must be one approved by the Department of Internal Affairs. This situation suggests that the legislature has brought about an improper division of duties between the Department of Internal Affairs and the Department of Labor and Industry; one department or the other should be charged with the duty of approving the form of publication of ordinances of all classes of municipalities.

Apparently also by the revision of 1947 boroughs are subjected to an additional requirement not imposed on the other classes, that of being confined only to those standard building codes which are approved by the state agency. This latter discrepancy is unimportant, however. The state will probably continue to approve every recognized uniform building code.

3. Adoption of Building Codes Which Incorporate Other Building Codes by Reference

In connection with the existing statutory authority under which Allegheny County municipalities may enact building codes by reference, one other small problem appears, a problem which offers

⁶ Act of May 4, 1927, P. L. 519, Art. XII, § 1202, Cl. LXI, as amended May 28, 1945, P. L. 1089, § 9, July 10, 1947, P. L. 1621, § 40; 53 P. S. 13372.

only matter for conjecture. The *Abridged Building Code* of the Building Officials Conference of America, one of the most promising of uniform national codes, incorporates within it by reference the *Basic Building Code* promulgated by that same organization. The problem is this: If a municipal legislative body through adoption by reference enacts the *Abridged Code* into law, does that same enactment also give the force of law to the *Basic Code* which is incorporated by reference within the *Abridged Code*?

The reasonable answer to this question would seem simple. Virtually all of the uniform national building codes available today are performance codes which incorporate by reference within themselves dozens of material standards such as those worked out by the American Society for Testing Materials. Our courts would probably hold that the legislature, in making its original grant of power to adopt by reference, must have contemplated that the adoption of a national code would embrace the adoption of those standards which are in turn incorporated by reference within the national code. If the adoption of such material standards is within the contemplation of the legislature, on the same basis entire building codes or sections of them which are incorporated by reference in the code primarily adopted surely must also be within the purview of the statutory authority to adopt by reference.

However, when the adoption by reference of a model code involves the adoption of related documents which the model code incorporates into its terms, the municipality should keep on file, available to the public, not only the model code which was primarily adopted by it but also the related documents which the model code in turn incorporates into its provisions.

4. *Effect of Change of Model Building Code or Standards*

Inevitably after a local unit adopts by reference a national building code together with material standards included in such code, the national organizations which originally have drawn up such models will continue to revise them in the light of developing technical knowledge. However, the courts have uniformly held that, by a single enactment, only the model law as it exists at the time of the enactment can be adopted. In order to reap the benefits

of the revised models, the local municipality must enact new adopting ordinances.

The reason underlying this rule is that the courts will not permit local councils to redelegate to private agencies the power to amend local ordinances, which the state legislature has in the first instance delegated to the local councils.

With regard to this question, an important distinction may be suggested. Although no court has yet been presented with the question, it is possible that the rule stated above (that local units can adopt a code or standard only as it exists at the time of the enacting ordinance) applies only where the code or standard is adopted as a requirement with the force of law. In present-day practice, the intention of the local government is usually to adopt a model *code* as law; hence the rule stated will apply to codes so that changes of complete model codes by the private agencies which create them cannot operate to amend the content of the local ordinance.

But approved standards, on the other hand, are often not adopted as mandatory requirements with the force of law, but are adopted only to provide one alternative means by which adherence to the performance requirement (which *is* law) can be measured. Under many performance codes, approved standards promulgated by national technical agencies are specified in order to indicate to the builder how he can *best* comply with the performance requirement, but the builder may use alternative materials and methods if such alternatives also satisfy the performance requirement.

Therefore, if approved standards are used in a code in order to *advise* the builder rather than as mandatory requirements, perhaps the ordinance may legally provide that the approved standards "as changed from time to time" shall apply, without the necessity of enacting a new ordinance each time the municipality wishes to take advantage of an improved version of a technical agency's standard.

As stated above, this distinction has not been tested in a court of law. In theory, however, the distinction here advanced is a reasonable one. Only future cases will decide whether it could be applied logically to all the intricate technical-legal problems which arise

when external approved standards are used to supplement a performance code.

Related problems are discussed in Section C of Chapter IV which outlines the various means by which approved standards are employed.

D. Statutory Limitations on the Amount of Fines

1. *Maximum Fine in Second Class Cities*

The amount of penalty allowable in Pennsylvania appears in the same pattern of statutes which were discussed above in connection with the functions of state agencies in the procedure of adoption by reference. The statute applicable to second class cities,⁷ which allows a maximum \$500 penalty, apparently amends the general law of second class cities as far as building codes are concerned. The general act which governs second class cities⁸ has a provision limiting fines for violation of all types of ordinances to a maximum of \$100. The act of 1937, which relates to building regulation powers only, did not expressly amend the 1901 act, and there has been no occasion for a judicial expression on the matter because the building code of the City of Pittsburgh (the only second class city) does not attempt to impose any fine over \$100. However, the later building regulation act probably would be held by the courts to amend the earlier general act by implication so that, for the violation of building ordinances only, the City of Pittsburgh could take advantage of the higher maximum of \$500. If Pittsburgh's council should consider the higher maximum penalty a desirable one (its desirability is discussed in Chapter VIII of this report) it would probably be safe in believing that the older act is amended to this extent. *Commonwealth v. Schaeffer*⁹ decided that where a penalty imposed in an ordinance exceeds the amount authorized by statute, the ordinance is not wholly void, but a fine may be recovered up to the lawful monetary limit.

⁷ Act of April 14, 1937, P. L. 313, § 1, as amended June 20, 1939, P. L. 474, § 1; 53 P. S. 2224.

⁸ Act of March 7, 1901, P. L. 20, Art. XIX, § 3, Cl. XLIII; 53 P. S. 9686.

⁹ 98 Pa. Super. 265 (1930).

2. *Effect of Legislative Codification of Municipal Law Upon Maximum Fines Allowable in Boroughs and Second Class Townships*

In recent years the Pennsylvania legislature has made a beginning at codifying certain portions of the law applicable to local government. We now have the Borough Code, revised in 1947, the First Class Township Code, revised in 1949, and the Second Class Township Code, revised in 1947; and in 1951 the third class city law has also been codified. Although unofficial compilations of laws have always been very helpful, official codification of local government law at its source, the legislature, is a beneficial further step. Certainly local officials would have a difficult time discovering their powers, and the citizens would have an impossible time learning their duties if everyone had to search through volume after volume of statutes arranged merely chronologically according to date of enactment; the collection and organization of most or all of the statutes applying to each class of municipality decreases the burden of the lawyer a great deal.

However as the result of the beginnings of official codification in Pennsylvania, the maximum amount of fines which can be used in the building codes of boroughs and second class townships may have been affected.

In 1937 the so-called "Housing Act"¹⁰ was passed; this statute, which today is still the statute underlying building codes of second-class cities, at the time of its enactment applied to boroughs and second-class townships as well. It empowered second-class cities, boroughs and second-class townships to enact regulations governing building construction, to adopt building codes by reference, to appoint building inspectors and to enforce building ordinances by means of monetary fines and actions at law and in equity. As has been stated in connection with the discussion of maximum fines allowable in second-class cities, the maximum fine allowed by this statute was \$500.

This 1937 statute, although it dealt with boroughs and second-class townships whose law had already been codified, was enacted outside of the Borough and Second Class Township Codes and

¹⁰ Act of April 14, 1937, P. L. 313, as amended June 20, 1939, P. L. 474; 53 P. S. 2224-2226.

hence modified them. Since 1937 however, the Borough and Second Class Township Codes have been extensively revised; in 1947 both were entirely reenacted and to some extent amended, and in 1951 the Second Class Township Code was further amended. Into the 1947 reenactment of the Borough Code,¹¹ all of the substance of the Housing Act of 1937 was incorporated, except the penalty provision. The same addition was made to the Second Class Township Code in 1951;¹² provisions similar to the 1937 act were added so that now the Second Class Township Code as well as the Borough Code contains sections which allow the enactment of building ordinances, the adoption of them by reference, the appointment of building inspectors and the use of actions in equity. But no mention of the \$500 maximum fine provisions of the 1937 act has been included in either the Borough or the Second Class Township Code.

Prior to the 1937 act the fine imposed for violation of any and all borough ordinances could not exceed \$100 and the fine imposed for the violation of a second-class township ordinance could not exceed \$300. The provisions in the Borough¹³ and Second Class Township Code¹⁴ which today state the maximum fine for the violation of their general ordinances still name \$100 and \$300 for boroughs and second-class townships respectively.

The question then is whether the 1947 and 1951 reenactments and amendments of these two codes reduced the maximum fine for building ordinance violations which the Housing Act of 1937 had raised to \$500. (The increase allowed in 1937 was not reflected in any of the building codes of Allegheny County, principally because the larger portion of Allegheny County building ordinances were adopted before 1937.)¹⁵

¹¹ Section 1202, Cl. LXI, as amended by Act of July 10, 1947, P. L. 1621, § 40; 53 P. S. 13372.

¹² Act No. 85, 1951, § 8; 53 P. S. 19093-702 Cl. L-LIII.

¹³ Section 3108, as amended by Act of July 10, 1947, P. L. 1621, § 91; 53 P. S. 15198.

¹⁴ Section 702, Cl. XLI, as last amended by Act No. 85, 1951, § 7; 53 P. S. 19093-702 Cl. XLI.

¹⁵ The *Recommended Building Code for Use in Borough Governments*, published in June of 1947 by the State Department of Internal Affairs, contains a maximum fine of \$200, stated in Art. XXV, § 2500.

Both the Borough¹⁶ and Second Class Township Codes¹⁷ contain legislative declarations which read as follows:

"It is the intention that this act shall furnish a complete and exclusive system for the government and regulation of [townships and boroughs] except as to the several matters enumerated in . . . this act."

Section 103 of the Second Class Township Code and section 102 of the Borough Code enumerate certain specific exceptions which expressly are not embraced in the codification statutes, relating to matters such as elections, justices of the peace and the Penal Code. The repealer sections in each of the codes contain the usual provisions that acts inconsistent with them shall be repealed. They also expressly designate certain acts as repealed. Those provisions of the Housing Act of 1937 which relate to the maximum amount of fines are not included in the Codes, are not specifically enumerated as exceptions, and are not expressly repealed.

However the \$500 limit set by the 1937 act may be held to be repealed by the 1947 and 1951 revisions of the Codes because the very existence of the 1937 act's penalty provisions are inconsistent with the declaration that the codes are intended to be a "complete and exclusive system."

The Statutory Construction Act of 1937 states in section 91:

"Whenever a law purports to be a revision of all laws upon a particular subject or sets up a general or an exclusive system covering the entire subject matter of a former law and is intended as a substitute for such former law, such law shall be construed to repeal all former laws upon the same subject."¹⁸

At first glance this section would seem to settle the question by requiring the courts today to find that the prior penalty provisions of the 1937 act are repealed.

Note the qualification that the new law must be one "intended as a substitute for such former law" in order to repeal the former

¹⁶ Act of May 4, 1927, P. L. 519, Art. XXXIII, § 3301, renumbered Art. XXXV, § 3501, and amended July 10, 1947, P. L. 1621, § 95; 53 P. S. 15281.

¹⁷ Act of May 1, 1933, P. L. 103, Art. XXI, § 2101, renumbered Art. XXII, § 2201, and amended July 10, 1947, P. L. 1481, § 49; 53 P. S. 19093-2201.

¹⁸ Act of May 28, 1937, P. L. 1019, Art. VII, § 91; 46 P. S. 591.

law by implication. Because the *enactment* provisions which were contained in the 1937 Housing Act were inserted almost verbatim in the 1947 and 1951 revisions of the Borough and Second Class Township Codes, these latest provisions may be said to be ones intended as substitutes for all of the 1937 act. However the troublesome fact is that the *penalty* provisions of the 1937 act have since that time neither been included in the new versions of the Codes nor expressly repealed by them.

The repeal of a statute by implication is not favored by the courts. In *Haller Baking Company v. Borough of Rochester*,¹⁹ the Pennsylvania Superior Court dealt with a legislative declaration contained in the Borough Code of 1927 which was framed in exactly the same terms as the legislative declaration which causes concern here. In the *Haller* case the court refused to accept the argument that because the legislature had declared the Code to be "a complete and exclusive system", all prior statutes outside the Code were repealed unless expressly saved. The court said:

"Repeal by implication is not favored; . . . such an interpretation, therefore, is not to be adopted unless it is inevitable. . . . Where a statute expressly repeals specific acts there is a presumption that it was not intended to repeal others not specified. In such case there is an implied approval of the statutes not specified as well as evidence of intention to leave them undisturbed and the doctrine of implied repeal does not apply."²⁰

In other cases since the *Haller* case, the Pennsylvania courts have also said that an earlier statute is repealed "only when the subsequent statute provides a complete and comprehensive method for doing what was provided for in the prior statute and *the two methods are exclusive and cannot be harmonized*."²¹

We must note here that the building law sections which were added to the Borough and Second Class Township Codes in 1947 and 1951 do provide a "complete and comprehensive method for doing" what the 1937 Housing Act allowed. But the present pro-

¹⁹ 118 Pa. Super. 501, 180 Atl. 108 (1935).

²⁰ 118 Pa. Super. at 513, 514, 180 Atl. at 114.

²¹ Appeal of Oriole, 146 Pa. Super. 464 at 467, 22 A. 2d 611 at 612 (1942)—*Italics supplied*.

visions of the codes can be harmonized with the 1937 statute because they have exactly the same effect as that earlier statute, except that they do not state any specific penalty for building ordinances in particular and the 1937 statute does.

Another factor which must be considered is section 83 of the Statutory Construction Act, which deals with reenactments of earlier statutes and their effect upon statutes enacted during the intervening period. Section 83 says:

"A law which reenacts the provisions of an earlier law shall not be construed to repeal an intermediate law which modified such earlier law. Such intermediate law shall be construed to remain in force and to modify the reenactment in the same manner as it modified the earlier law."²²

The 1947 versions of the Borough and Second Class Township Codes were reenactments of the general ordinance penalty provisions of the 1927 Borough Code and the 1933 Second Class Township Code; therefore, if we apply section 83 of the Statutory Construction Act, the Housing Act of 1937 is an intermediate act which having once modified the original general penalty provisions of the original borough and second-class township codes, now continues so to modify them.

This brief examination of the authorities is sufficient to show that arguments may be made on both sides of this perplexing question. Whether or not the general ordinance penalty provisions contained in the two codes, setting the lower maximum limits of \$100 and \$300, today operate to reduce the \$500 maximum of 1937 is a question which could be decided either way in the courts, should a borough or second-class township attempting to impose the higher maximum be challenged.

Again relying on *Commonwealth v. Schaeffer*,²³ boroughs and second class townships which desire a high maximum might place in a building ordinance a \$500 maximum in order to test the matter; because of the holding in that case the validity of the ordinance itself would not be jeopardized. Preferably, however, the matter should be clarified by the legislature, at least if the

²² Act of May 28, 1937, P. L. 1019, Art. VI, § 83; 46 P. S. 583.

²³ 98 Pa. Super. 265 (1930).

higher \$500 maximum fine is desired for building construction ordinances.²⁴

3. *Fines in Third Class Cities and First Class Townships*

The two remaining classes of municipalities, third class cities, and first class townships, are not in any doubt as to the maximum penalty which they may impose, because they were not at any time covered by the Housing Act of 1937. The First Class Township Code in its general section on fines²⁵ prescribes a \$300 maximum; the specific powers to enact building regulations are contained within the Code itself and present no conflict with the general section. The third class city law contains the penalty provisions in the sections specifically relating to building ordinances.²⁶ Here the amount is also \$300.

If second class cities, and possibly boroughs and second class townships also, may impose penalties up to \$500, there seems to be no reason why third class cities and first class townships should be held to a lower maximum. The class in which the municipality falls should have no bearing upon the amount of fine which it may impose for the violation of its building ordinances. The need for a deterrent in the form of a monetary fine does not vary in proportion to the size or legal status of the civil subdivision within which a violation is committed. The inconsistently small maximums available to third class cities and first class townships should be corrected by the legislature. The maximum should be a uniform one in all classes.

E. Recitation of Statutory Authority in Preamble of Ordinances

Some American cases have held that where within an ordinance the local legislative body states that the ordinance was enacted pursuant to a specific statute, the ordinance becomes void if that

²⁴ An interesting feature of the penalty powers of boroughs is that borough councils have the power "to mitigate or remit fines and forfeitures in reasonable cases." Act of July 10, 1947, P. L. 1621, § 23; 53 P. S. 12895.

²⁵ Act of June 24, 1931, P. L. 1206, Art. XV, § 1502, as amended May 27, 1949, P. L. 1955, § 31; 53 P. S. 19092-1502, Cl. II. Like boroughs, first class township commissioners have the power to remit fines.

²⁶ Third Class City Code, § 4120, renumbered § 4131 and revised by Act No. 164, 1951, § 41.

particular statute is repealed, even though the municipality might have the authority to continue to enforce such an ordinance under some other statutory provision. Such a holding by the courts is unreasonable and fortunately rare; however, to be perfectly safe an unnecessary recitation that an ordinance is based upon a particular statute should be avoided. Several Allegheny County building codes contain such a recitation; for example, Ordinance Number 36 of FOX CHAPEL recites²⁷ that the ordinance is enacted under the authority of the statute of 1937 and also expressly bases the ordinance provision permitting the abatement of non-complying buildings upon that statute.

The Pittsburgh building code in its preamble has a phrase which is a model of the preferable and safer general statement. It says, "Whereas, legislative authority is vested in cities of the second class . . ." An ordinance *need not* specify particular authority.²⁸ From the viewpoint of the legal counselor, if nothing is to be gained by a specific statement, a kind of statement should be used which does not offer even a slim chance of causing the ordinance to be invalidated.

²⁷ In § 2 of Art. XIV.

²⁸ Bothwell v. York, 140 Atl. 130, 291 Pa. 363 (1927).

CHAPTER II

NECESSITY OF A VALID ORDINANCE TO EMBODY BUILDING REGULATION

A. Necessity of Local Enactment

To the person experienced in the legal requirements of local government a discussion of the necessity of a local legislative act to implement the powers of building regulation which the state has conferred upon municipalities may seem superfluous. But such a discussion is included here because the Project's survey of building regulation in Allegheny County indicates that in some communities the construction of housing is being regulated without any ordinance to define the requirements which the builder must follow or the duties which those administering the government must perform.

That there is no inherent police power in local governments (at least as far as building codes are concerned) in a non-home-rule state is a principle which bears repeating. Even a clearly and specifically delegated power cannot be exercised without the use of a proper legislative enactment by the local council, commissioners or supervisors, unless the matter be a purely administrative one. A top authority in the field says:

"Ordinances are necessary unless the method of executing the power is sufficiently prescribed by charter or legislative act to make it, or it is in its nature, a purely administrative duty. In case of doubt the authority for the act and the manner of its execution should be directed by the council or governing body in appropriate form."²⁹

The Pennsylvania courts have been very clear on this matter. In one case the Borough of Hanover had no ordinance regulating shade trees or defining their location. Notwithstanding this lack the burgess served upon a property owner a notice that a tree on the pavement in front of the property owner's house had been "condemned as a nuisance"; the notice required the property owner to remove the tree within 30 days and stated that if there was a failure of compliance, "the ordinance governing such cases" would

²⁹ McQuillan, *THE LAW OF MUNICIPAL CORPORATIONS*, § 15.03 (3rd ed. 1949).

be enforced. Because there was actually no ordinance covering the matter and because the notice was not the result of a judicial proceeding to abate a nuisance, a lower Pennsylvania court upheld the property owner's objections.³⁰ The court pointed out that even if Hanover had the power to remove obstructions on public ways, that power must be exercised by virtue of ordinances of general application.

Outside Pennsylvania the courts have taken a similar stand; an appellate court in Alabama required building regulation powers to be implemented by ordinances. That court said:

"This power [to regulate the erection of buildings] must be exercised, if at all, by the adoption, by the governing authority of the municipality, of an ordinance, or ordinances, not inconsistent with the statute granting this power, prescribing reasonable regulation and the conditions upon which . . . permits may be obtained, and conferring upon the governing body or some officer . . . , the authority to grant . . . permits, upon compliance, by the applicant, with the regulations prescribed therefor."³¹

Of importance is the distinction made between legislative acts and those which are administrative or ministerial. The Pennsylvania Superior Court has by way of dictum briefly defined the distinction. "Permanent regulations for the government of the borough . . . are regarded as of a legislative character; the ordinary administration of municipal affairs . . . and the transaction of routine business are ministerial or executive rather than legislative."³² Later decisions extend the definition. They point out that ministerial or executive matters include "the transaction of current business, the ordinary administration of municipal affairs and the awarding of contracts which have been previously authorized." Classed among legislative matters, on the other hand, are "permanent regulations for the government of the borough . . . and the creation of liability by contract."³³

³⁰ *Gitt v. Hanover Borough*, 4 Dist. 606 (Pa. 1895).

³¹ *Lewis v. Jenkins*, 215 Ala. 680, 112 So. 205, at 206 (1927).

³² *Jeffreys v. Versailles*, 55 Pa. Super. 85, at 86 (1913).

³³ *Miller v. Westview Borough*, 57 Pa. Super. 14, at 17 (1914). Although the cases cited here contain references to boroughs, the rules stated by the courts apply generally to all classes of municipalities.

A program of housing and construction regulation must be viewed as a legislative matter because the operation of such a program contemplates rules of general and continuing application. From a social viewpoint there can be no beneficial program if building permits are issued merely upon an *ad hoc* basis at the whim of a building inspector, municipal secretary or a council acting ministerially. From a legal viewpoint regulation attempted without the benefit of an ordinance of general application will succeed only if not challenged; local officials will not be aided by the courts if they try to regulate housing on the basis of a mythical omnipresent police power, because, where the subject matter is legislative, such police power as has been delegated to them must be embodied in an ordinance. The basis of the requirement is a reasonable one. Without an ordinance defining how buildings are to be constructed or equipped the owner or builder would have to depend upon administrative fiat. The administering official himself needs an ordinance to guide him in determining what is compliance.

Besides the judicial statements and the arguments based on principle, the enabling statutes themselves clearly state that the powers conferred by them must be exercised through the enactment of an ordinance. An example is the new section of the Borough Code which gives the power "to enact and enforce *suitable ordinances* relating to buildings, their construction, alteration, . . ."³⁴ The statutes applicable to all other classes are phrased in the same language; all of them give, not simply the power to regulate buildings, but rather the power to enact and enforce ordinances governing construction.

In spite of the express words of the enabling statutes on the matter, some local governments in Allegheny County, as well as elsewhere, continue to attempt building regulation without ordinances.

The Project's survey indicates that the Borough of CASTLE SHANNON, although it at one time had a small building law, had none in force in 1950. An interview with CASTLE SHANNON'S former building inspector disclosed that some reliance is placed upon F.H.A. requirements as a guide in the issuance of building permits.

³⁴ Act of July 10, 1947, P. L. 1621, § 40; 53 P. S. 13372. Emphasis supplied.

Another example of building regulation without an ordinance is presented by EAST PITTSBURGH, where the borough secretary is charged with the issuance of permits (or the withholding of them, which is really the critical act), pursuant to an action of council taken in each individual case.

The Borough of HOMESTEAD, although it has a fire zone ordinance covering part of the borough, has no building code recorded or in force. Here such control of construction as exists is in the hands of the borough secretary. Some reference is made to Pittsburgh's building code as a guide when necessary. The reason for an absence of a building ordinance is not a desire to flaunt legal rules, but arises from the absence of new building in HOMESTEAD. That borough is now virtually entirely built up out to its limits; the borough secretary points out that there are only about 50 building lots remaining unused. However, when this small residue of unused building space is considered together with the fact that even in a built-up area repairs, substantial alterations, and rebuilding still go on, a need for an ordinance to govern these matters still remains.

The Borough of MUNHALL presents an example of plumbing regulation based upon a questionable legal foundation. In 1901, 1909, and 1913, the legislature created the state plumbing code³⁵ which applies to second and third class cities. Many sections of that plumbing code were amended and extended to certain boroughs and first class townships in 1937.³⁶ But that act of 1937 was repealed insofar as it relates to boroughs and townships by a 1939 statute.³⁷

The state plumbing code has always applied to DUQUESNE, a third class city. In 1930, DUQUESNE'S building code³⁸ was adopted virtually verbatim as the building code of MUNHALL,³⁹ and in the same ordinance MUNHALL'S council also enacted the terms of the state plumbing code (as it then applied to DUQUESNE) to serve MUNHALL as a plumbing ordinance.

³⁵ Act of June 7, 1901, P. L. 493; Act of May 14, 1909, P. L. 840; Act of June 12, 1913, P. L. 476; 53 P. S. 2551 *et seq.*

³⁶ Act of March 31, 1937, P. L. 168.

³⁷ Act of May 17, 1939, P. L. 151.

³⁸ Ordinance No. 217, June 22, 1925, recorded in the Allegheny County Recorder of Deeds office in Book No. 1, page 146.

³⁹ Ordinance No. 517, October 21, 1930; Recorder of Deeds Book No. 3, p. 147.

Then, as stated above, the state plumbing code was amended so that it applied to MUNHALL and other boroughs as a state statute from 1937 to 1939. Because the state statute prevails in such a conflict, the state plumbing code must have superseded the plumbing regulation portion of MUNHALL'S ordinance, even though that part of the ordinance had been originally based upon the statute itself. But then in 1939 the Legislature decreed that the state plumbing code should no longer apply to boroughs. Although there are no Pennsylvania cases on such a question, possibly the plumbing requirements of MUNHALL'S ordinance, after being superseded in 1937 by the statute, were not automatically revived by the repeal of that statute as to boroughs in 1939. MUNHALL'S council did not reenact the plumbing ordinance provisions after 1939. Thus the present validity of the provisions under which MUNHALL is regulating plumbing is doubtful. MUNHALL could insure the validity of its plumbing regulation by adopting new plumbing regulations based upon a more up-to-date model.

No one benefits when a municipality fails to embody its housing regulation in an ordinance. In the absence of an ordinance, builders and owners must depend upon the possibly changing attitude of the administering officials; the municipality, if put to a judicial test, would find itself unable to enforce its informal pattern of regulation; its officials themselves might be subject to personal liability if they abated non-complying structures without the benefit of an ordinance vesting them with such a power.

Many municipalities which have ordinances in force often extend the scope of those ordinances informally without benefit of a proper amendment. Such an extension of regulation is subject to the same social and legal objections as those presented in this section. The nature of such extensions is discussed in following chapters.

B. Statutory Requirement that Building Codes Be Submitted to the Recorder of Deeds

1. *The Requirements in General*

Today building (and zoning) ordinances must not only be enacted by the use of the legislative procedure prescribed for all types of ordinances, but after enactment certified copies must be submitted

to the county Recorder of Deed's office. This additional requirement was imposed by the legislature in 1949 upon both building and zoning ordinances in very similar terms. The statute applying to building regulations reads:

"Every political subdivision of this Commonwealth authorized by law to adopt building ordinances or codes restricting, regulating or otherwise affecting the construction, reconstruction or improvement of real estate located within the boundaries of such political subdivision, shall file a copy of any such ordinance or code, or amendment thereto, certified to be true and correct by the proper officer, in the office for the recording of deeds of the county wherein the political subdivision is situate, which copy shall be adequately indexed to enable a person using the same to readily find the various types and kinds of regulations or requirements of such ordinance or code."⁴⁰

2. *The Requirement That Each Building Ordinance Copy Must Have an Index*

This building ordinance statute, then, requires municipalities having building ordinances or enacting them in the future to submit a copy of each ordinance to the Recorder of Deeds. The copy submitted must be a certified one and it must be adequately indexed. The meaning of submission of ordinances to the Recorder of Deeds and the question of the nature of the Recorder's duty is discussed in the following subsection of this chapter. The two requirements that the ordinance be certified and that it be indexed deserve mention here however. The requirement of certification is simple and self-explanatory. The requirement that the ordinance copy be an indexed one apparently requires some explanation because very few of the ordinances submitted to the Allegheny County Recorder of Deeds have been provided with indexes or with any other means which would "enable a person using the same to readily find the various requirements." This clause has been largely ignored perhaps because it is easily confused with a requirement in the third section of this act which requires the Recorder of Deeds "to maintain an adequate index" of all the ordinances submitted to him.

⁴⁰ Act of May 20, 1949, P. L. 1531; 53 P. S. 271-273.

These two indexing requirements are entirely separate, however. The act requires both that the municipal officials index their particular ordinance so as to make the regulations within that one ordinance accessible to interested persons and also that the Recorder of Deeds maintain an index of all the ordinances of the county which have been submitted to him.

Whether each municipality must provide a subject-matter index for the particular ordinance which it submits or whether a table of contents or other means of reference will suffice are questions which must be decided in the future by judicial interpretation of this statute. Probably the courts will not insist that the requirements can be satisfied only by a conventional subject-matter type of alphabetical index but will say that the requirement can be satisfied by other means of reference so long as they are adequate.

As will be pointed out in a later subsection of this chapter any ordinance which does not comply with the provisions of the statute becomes "void and of no effect." If an ordinance is not submitted to the Recorder of Deeds it will become void. A literal reading of the statute would also indicate that even if an ordinance is submitted to the Recorder of Deeds it will nevertheless be void if it does not comply with the statutory requirement that it must be provided with an index. If ordinances are rendered void because they lack an index, then virtually all the building ordinances in Allegheny County are today void and of no effect.

In Chapter V of this report the usefulness of reference devices such as indexes, tables of contents and appendices is strongly advocated. Because the use of such reference devices is not only advisable but also may be a necessary condition precedent to the very validity of building ordinances, copies of ordinances which are submitted to the Recorder of Deeds under this statute certainly should be provided with an index.

3. The Nature of the Requirement That Ordinance Copies Be Submitted to the Recorder of Deeds

The certification and indexing of an ordinance copy must be done by the municipal officials before they take the ordinance copy to the Recorder of Deeds' office. The next question is the nature

of the major requirement of the statute, the requirement that the ordinances must be "filed" with the recorder.

Miscellaneous documents such as these, when presented to the Recorder of Deeds, are ordinarily first entered in the "blotter" (officially known as the "primary index") at that office. The Project has determined that as of March 30, 1950, two building codes which were then considered to be in full operation by their municipalities, Pittsburgh and McCandless Township, had not been entered in the primary index at the Allegheny County Recorder of Deeds' office.

In the case of McCandless Township, the omission of filing can be easily explained. Its officials have reported to the Project that they purposely did not file their ordinance because they contemplate enacting a new building code in the near future.

In the case of Pittsburgh's ordinance the omission of filing is linked with the interpretation of the statutes and the question of what must be done in order to comply with the statutes' requirements. The City of Pittsburgh, especially with regard to its 1923 zoning ordinance (which has hundreds of amendments), holds that the statutes require only that the recorder file the same certified copies which are submitted to him. Allegheny County officials on the other hand maintain that the acts require the recorder to have ordinances transcribed verbatim onto the pages of a recording book. The transcribing procedure is of course more expensive than the filing procedure.

The statute which requires building codes to be recorded and the statute which applies to zoning ordinances⁴¹ are virtually in the same terms. Both acts state that the recorder of deeds must provide an ordinance book and must "maintain an adequate index as part of the same in which the *filed*⁴² copies of any such . . . ordinance and amendments thereto . . . shall be kept." Both statutes also say, "the recorder of deeds shall charge the political subdivisions for *filing*⁴³ the same fee equal to the fees authorized by law for the same or similar services." Thus because the statutes

⁴¹ Act of May 14, 1949, P. L. 1340; 53 P. S. 261-263.

⁴² Emphasis supplied.

⁴³ Emphasis supplied.

talk about "filing" rather than "recording" or "transcribing" the city's position is somewhat substantiated. On the other hand the functions of the recorder of deeds office are primarily recording functions rather than filing functions. The fact that the 1949 statutes require the recorder to set up an ordinance "book" as well as an index, rather than "facilities for filing" tends to aid the county's point of view that the legislature actually contemplated a transcribing of the ordinances.

The Allegheny County Recorder of Deeds office has transcribed all other ordinances submitted to it. On the other hand, Recorders of Deeds in some other counties in the state have simply filed in filing cabinets the same ordinance copies which were submitted to them.

In order to reach a closer approximation of how a court would interpret these statutes, the Project extended its research into the background of the legislative intention of the act. When a court is faced with the problem of determining the meaning of a statute, if the plain meaning is not apparent, it will look at the record of debates on the floor of the legislature and at records of committee discussions, if any.

The Project has examined the *Legislative Journal* of the Pennsylvania General Assembly. Although the zoning code statute was passed by both houses without debate, and although the Senate passed the building code statute also without debate, the House proceedings for April 22, 1949, at page 3978, report a brief debate on the building statute there at the time of its passage. Mr. Robertson of Delaware County, one of the sponsors of the bill, was interrogated about the purpose of the bill. He explained that the purpose was to provide for a central location in the county where all the building codes might be found. Then he was asked:

Mr. ORBAN. Mr. Speaker, do I understand that under the gentleman's bill the copy of the building ordinance itself must be filed in the offices of the Recorder of Deeds?

Mr. ROBERTSON. That is right, Mr. Speaker.

Mr. ORBAN. Where in the office of the Recorder of Deeds is there any authority to file these ordinances, within this act?

Mr. ROBERTSON. Section 4 of the act requires the Recorder of Deeds to file such ordinances.

Mr. ORBAN. Mr. Speaker, will these ordinances be required to be recorded?

Mr. ROBERTSON. Mr. Speaker, the bill says "filed".

Mr. ORBAN. Does it say filing or recording?

Mr. ROBERTSON. No, Mr. Speaker, it says "filed" in the bill.

Although the content of this debate is rather inconclusive because the printed page does not record the inflections of the speakers, it seems to bolster the view that the statutes require only filing, not recording.

In considering the question, a court will look at the official records of floor and committee debates. According to these sources, apparently, the intention of the legislature is clear. However, it is not controlling. A court will resolve the ambiguity from the words of the statutes themselves as far as possible. The statutes are weakened in reflecting the legislative intention by the provisions for ordinance books rather than filing facilities; these provisions on their face do not pertain merely to an index, in book form, to be used in conjunction with filing facilities. A court will consider this provision and might also consider the argument advanced that Recorder of Deeds' offices primarily are recording and not filing offices.

The statutes should not be so loosely phrased as to permit such an honest difference of opinion. If failure to comply with these acts is penalized by such a serious consequence as invalidation of the ordinance, then the statutes should define compliance in unmistakable terms.

4. *Entry in Primary Index as Proof of Submission*

Whether or not the Pittsburgh officials have actually submitted a certified copy of the building code to the Recorder's office, the central fact is that it has not been entered upon the primary index. By statute⁴⁴ the Recorder of Deeds must place in a "fair book," presumably the primary index, a brief descriptive entry whenever any deed or writing is submitted to him "to be recorded." The

⁴⁴ Act of March 18, 1775, 1 Sm. L. 422, § 6; 16 P. S. 3302. Rules of court may also apply. The act of May 1, 1919, P. L. 100, §§ 1-3; 16 P. S. 3201-3203 provides that uniform indexing systems be set up by the judges of common pleas and orphans' court.

same statute provides that the Recorder shall give a receipt to the person bringing the writing and states that the Recorder shall receive no fee for the mere entry and receipt.

But this statute does not settle the difference of opinion at present existing between the county and the City of Pittsburgh, a controversy which may arise elsewhere. No entry in the primary index need be made or receipt given if the ordinance is not submitted "to be recorded"—which Allegheny County would take to mean transcribed.

Several cases have held that when a deed or mortgage is submitted to the Recorder, it constitutes notice to prospective purchasers of the land from that time forward, even before it has been transcribed into the final records.⁴⁵ The best evidence of such a submission is the entry upon the primary indexes. By analogy, entry upon the primary index of the submission of a zoning or building code is the best evidence of that fact during the period which the Recorder's office would require to file the ordinance (or transcribe it into the record books, if that is what the statutes are held to require). If the ordinances are filed loose, the possibility that they may be lost also makes the requirement of entry in the primary index advisable. Although, if an ordinance is challenged in court as not being filed in compliance with the statute, the entry in the primary index may not be the only evidence which a court would accept, it is the most convenient method of proof. The statutes should expressly make entry upon the primary index the sole evidence admissible as to whether an ordinance has been submitted or not.

5. *Effect of Non-Compliance with Statute*

What is the effect of failure to file? The statute, although it leaves to the courts the question of fact as to whether an ordinance has been filed or not, uses strong language in stating the effect of failure to comply. It says:

"Any building ordinance or code or amendment thereto, heretofore adopted by any political subdivision, shall be void

⁴⁵ *Shebel v. Bryden*, 114 Pa. 147, 6 Atl. 905 (1886); *Farabee v. McKerrihan*, 172 Pa. 234, 33 Atl. 583 (1896); *Wood's Appeal*, 82 Pa. 116 (1876).

and of no effect unless such political subdivision, shall comply with the provisions of this act within six (6) months of the effective date hereof. No building ordinance or code, nor amendment to an existing ordinance or code, shall become effective until the political subdivision adopting the same shall have complied with the provisions of this act."⁴⁶

What is meant by the statute's declaration that non-complying existing ordinances "shall be void and of no effect," and that ordinances or amendments shall not "become effective" until the act is satisfied?

Suppose that the provisions of an ordinance were violated by a builder but the ordinance was not filed until after the building had been completed and occupied. Assuming that the violation did not constitute a nuisance which might be enjoined or abated under common law rules, there is a question as to whether the ordinance is so reinstated by compliance with the Act of 1949 that it could be invoked to correct or penalize the prior violation. A reading of the "plain meaning" of the statutes (and this is the first step in judicial statutory construction) would indicate that during the period that the ordinance was not submitted to the recorder it had no force at all nor could a reinstatement of it permit the revived ordinance to operate retroactively to cover the period during which the ordinance was "void".

A more difficult question arises with regard to ordinances which originally were enacted before the passage of the statutes but which have become void under the acts because not filed in compliance with them. Will mere submission to the recorder revive the effectiveness of such an ordinance or must it first be reenacted by the municipal legislative body?

An ordinance enacted *after* 1949 of course need be enacted only once before submitting it to the recorder. But if ordinances which were originally enacted *before* 1949 are not submitted in compliance with the statutes, they are "void and of no effect,"—in other words, worthless pieces of paper. If that is their true status, they would certainly have to be reenacted before they are submitted to the recorder, in order to have any effect thereafter.

⁴⁶ Act of May 20, 1949, P. L. 1531, § 2; 53 P. S. 272. The statute relating to zoning ordinances has a like provision.

On the other hand, possibly the statutory language that "no building ordinance . . . shall become effective until" it is filed may be applied to pre-existing ordinances which have been invalidated because of non-compliance, as well as to ordinances newly enacted. If such a meaning is taken, then unrecorded pre-existing ordinances would not have to be reenacted by the local legislative body when they are finally filed. Nevertheless, the strong language of the first sentence in that section seems to eliminate the possibility that a revived ordinance would have a retroactive effect.

6. *Recommendations*

The examination of these incipient problems, which are new ones in Pennsylvania, points up several conclusions which may be offered to local governments and to the legislature.

All municipal officials should make sure that positive evidence of compliance is available and thus avoid the chance that a builder may sidestep regulations.

If validating statutes are not enacted, any Pennsylvania municipalities which have failed to comply with the 1949 acts as regards building and zoning ordinances which were in existence before the passage of those statutes, should reenact the ordinances before submitting them to the Recorder of Deeds in order to insure that they will thereafter be valid.

New ordinances should be submitted as soon as they are enacted.

If the 1949 statutes are retained, both of them (the one applicable to zoning ordinances as well as the one applicable to building ordinances) should be amended as follows:

(a) *The definition of compliance with the statutes should be clarified; specifically, the legislature should, in unmistakable terms, explain whether certified copies of ordinances must be submitted to the Recorder of Deeds, merely to be kept by that office in orderly fashion, or to be transcribed verbatim onto the pages of the Recorder's books.*

(b) *Entry in the primary index should be expressly made the sole evidence admissible in court as to whether an ordinance has been filed or not.*

(c) *The statutes should be clarified so that they make plain the*

absence of any necessity of reenactment of a pre-existing unrecorded ordinance in order finally to file it and place it again in force. At the time this report was being finally revised for publication, two bills had been introduced in the 1951 session of the Pennsylvania legislature which would cure the defect against which the third recommendation here is directed. House Bill 1447 states that any building or zoning ordinance which has become void because of non-compliance with the 1949 acts will be made valid without reenactment or re-publication if filed before the bill is passed or within 60 days after the effective date of the bill. Senate Bill 263 would operate similarly, but it provides a six-month grace period rather than a sixty-day one.

(d) *However, municipal officials and legislators should re-examine the wisdom of these statutes.* The possibility of more effective means of making building and zoning ordinances accessible should be considered.

At the present time, a new bill, House Bill 1515, is pending in the 1951 session of the Pennsylvania legislature. This bill would repeal the 1949 acts discussed here and substitute for them a new law in similar terms which does not demand that building and zoning ordinances be filed or transcribed but which does require that municipalities which have such ordinances must file certificates to that effect, in the Recorder of Deeds' office. Such a requirement, although less expensive than filing or transcribing the entire ordinances themselves, would not operate to make the text of the ordinances available to interested persons.

The problem of accessibility of the text of municipal regulations is primarily the responsibility of the local governments. Local governments should meet that responsibility so that the state legislature does not have to search for a general solution.

CHAPTER III

EXISTENCE OF BUILDING CODES IN ALLEGHENY COUNTY—PRESENT AND FUTURE

A. Existence of Building Codes

At the beginning of this Part, Table A indicates how many building regulation programs are in force in Allegheny County municipalities and also the percentage of the county's people which are covered by a building ordinance or code of some sort. According to that table 41% of the municipalities in the county do have a building ordinance and those building ordinances, 53 in number, cover 76% of the county population as set by the 1950 census estimates. If the over-balancing weight of the City of Pittsburgh is excluded, then in the outlying municipalities only 57% of the population is covered. If it is agreed that local regulation of building construction is a beneficial part of an integrated program intended to assure adequate housing, then, of course, no less than 100% of the municipalities and 100% of the population in the county should be covered by a proper building code.

Even those municipalities which are largely rural in nature and in which housing construction is sporadic today require a building ordinance just as broad in scope as those administered by neighboring more populous communities. We have seen in Allegheny County during the last few years a very striking growth of residential areas in the outlying townships and boroughs. If there is to be regulation at all, advance-planned regulation is the better answer; communities which are confronted only with a potential housing expansion should consider the adoption of building codes. Actually the nature of the technical engineering problems in building construction is such that a community whose housing is increased by only a few dwelling units a year has need for a building code equal in scope to those required by municipalities where the building program has already reached a higher pitch.

B. Age and Obsolescence

Mere examination of the pattern of ordinances which nominally govern the erection of housing units is not very revealing. From

both the social and legal standpoints the force of a building code must be more than nominal. Inadequate regulation often proves to be worse than no regulation at all. Such an effect is especially evident in the construction field where the minor technical elements change quickly even though the broad technique of construction remains fairly stable.

1. Age of Codes

The first test, then, of the adequacy of a building ordinance is its age. Very familiar to all builders and enforcement officers in Allegheny County has been the conversion from the use of 12-inch concrete block to 10-inch concrete block. Also familiar is the fact that this minor change has legally been barred by some of the building ordinances in Allegheny County which antedate that period of conversion. This one example demonstrates that an obsolete building ordinance which does not allow for such changes produces more than mere inconvenience. As later chapters point out, when an ordinance is faulty, enforcement officials tend to wink at violations of the strict provisions of the ordinance rather than bring about proper amendment of the ordinance. When illegal informality is thus introduced into a building regulation program, it tends to infect the administration of the entire problem.

The social aspects of an obsolete building code are too well known to require detailed proof here. If the effect of obsolescence is to encourage the sort of informal administration mentioned above, then the safeguards which would insure the carrying through of a broad, planned program are sacrificed and replaced by a situation which makes the success or failure of the program depend upon the talents of whatever particular officials may be presently in office. On the other hand, if the administrators of a building regulation program enforce obsolete provisions to the letter, the effect is necessarily to raise the cost of housing or in some cases actually to prevent a safer type of construction.

A look at the present Allegheny County situation with age as the first test brings out a great deal more than does a mere examination of the pattern of existing ordinances. If we measure age from the date of the basic code or ordinance rather than from the

date of the last amendment (as Table C at the beginning of this Part does) and if Pittsburgh is included in the computations, 28% of the population in county municipalities which do have some ordinance is covered by ordinances more than 10 years old. Without Pittsburgh, that percentage more than doubles; among the outlying municipalities 68% of the population is regulated by codes over 10 years of age. Of the 38 non-Pittsburgh building codes analyzed by the Project in Table E, six, or more than 15%, exceed 25 years of age.

These figures demonstrate that the problem of obsolescence among Allegheny County building ordinances is a considerable one; furthermore the county is exceptional in this respect compared with the nationwide picture. A recent survey pointed out that on a nationwide basis 27% of the codes are over 20 years old and 18% range from 16 to 20 years.⁴⁷ Of the sample 38 ordinances outside Pittsburgh which were tabulated by the Project, 18% are from 16 to 20 years old, exactly the same figure as in the national survey. But among the outlying county municipalities 47% of the ordinances tabulated are over 20 years old (31.6% range from 21 to 25 years of age and 15.8% exceed 25 years of age.—Table E); this Allegheny County percentage, 47%, is far greater than the national figure of 27%.

If the pattern of ordinances fails to meet the age test, then wholesale revision is indicated as necessary even before other factors are considered. The Bureau of Standards of the United States Department of Commerce says that "a complete overhauling at intervals of not over ten years, and preferably at somewhat shorter intervals, is desirable."⁴⁸ If 10 years is made the maximum advisable age, then, as Element I of Table E shows, only 34% of the municipalities outside Pittsburgh have codes adequately modern. Outside Pittsburgh two-thirds of the basic building ordinances are more than 10 years old; this fact alone indicates the need for wholesale revision of them.

The conclusion stated here is stated in terms of numbers of

⁴⁷ Bureau of Standards, Building Materials and Structures Report, B. M. S. 116, "Preparation and Revision of Building Codes," page 5 (1949).

⁴⁸ *Ibid.*

municipalities rather than in terms of coverage of population because the amount of work which must be expended in achieving the overhauling of the county's obsolete ordinances must be measured according to the number of new ordinances to be drafted and enacted. Remarkably enough, however, the percentage of population covered by obsolete codes is in this single instance almost the same as the percentage of the total number of municipalities; Table C shows that the population percentage is 68%. This phenomenon may be explained by pointing out that, while some of the more populous communities are those which have the incentive to keep their codes up to date, the newer and less populous communities have enacted their first building ordinance only in recent years; thus the two tendencies balance each other out.

2. *Effect of Amendments*

In discussing the age patterns above only the dates of the basic ordinances have been considered. No doubt the effects of the obsolescence there discovered have been somewhat offset by amendments to those original ordinances. Certainly the larger difficulties are the ones which cause enough trouble to create the incentive to amend the original enactment. However, the beneficial aspect of the amendments often proves to be inversely proportional to the age of the original ordinance which is being amended. A long string of unplanned amendments, although they may remedy specific defects, have the effect of destroying the unity and hence much of the usefulness of the code if they become too numerous and if they are not incorporated by recodification. This cluttering-up effect increases as the number of amendments increases and hence is most likely to be pronounced where the original code is a very old one.

Revision by amendment should be approached from two viewpoints: (1) consideration for the subject matter of the amendment and (2) consideration for the form of the amendment and its effect upon the unity of the whole code.

Subject Matter of Amendments: As far as subject matter is concerned most amendments which have been made to Allegheny County building ordinances have been fragmentary. They fre-

quently deal only with a clarification of administrative or enforcement provisions. When they do deal with technical matters, ordinarily no substantial changes have been made from the approach of the original ordinance. A common wartime amendment was one which conferred on building inspectors power to approve substitute materials for the duration of hostilities. (The legality of this sort of amendment is discussed in Chapter VIII, because it is an illustration of the problems arising when an attempt is made to confer liberal discretionary or rule-making powers upon an administrative official.)

The inertia which ordinarily throttles the enactment of needed substantive amendments can be overcome only when the primary ordinance itself provides some definite system for channeling the demand for a change. Among ordinances in Allegheny County the most common provision of this sort is framed to place upon the building inspector the duty of recommending needed amendments to the council or other legislative body. In the similar building codes of McKEESPORT,⁴⁹ DUQUESNE,⁵⁰ and MUNHALL⁵¹ the duty conferred on the building supervisor is a lesser one however; there he is required only to recommend to the Department of Public Safety (in the case of the third class cities) or to the council (in the case of Munhall) "any special regulations . . . necessary to define the intent and purpose of any portion of this ordinance. . . ." Such a provision does not go far enough. The building inspector should be required to recommend not merely interpretive regulations but also substantial technical changes in the ordinance, because he among all officials is in the best position to be aware of the need for such changes.

In order to insure that necessary changes will be discovered and to provide channels to carry them into enactment, a proper system should provide for two steps. First, the periodical reports which most ordinances today require the building inspection department to make should be made to include comments upon the technical adequacy of the ordinance; the building inspector's duty of recom-

⁴⁹ Ordinance No. 813, December 28, 1925.

⁵⁰ Ordinance No. 217, June 22, 1925; Recorder of Deeds Book No. 1, p. 146.

⁵¹ Ordinance No. 517, October 21, 1930; Recorder of Deeds Book No. 3, p. 147.

mending amendments should be made clear. Second, a citizens' board, perhaps a voluntary and unpaid one, should be appointed to consider the building inspector's recommendations immediately when they are made, and that board should report in turn to council with a draft of the new amendment if one is deemed necessary. Such a definite system will do much to overcome inertia. In the case of building codes public opinion is much less likely to be the original impetus for amendment than in the case of zoning ordinances where defects in existing regulation tend to affect a large group of citizens directly and immediately. The fact that defects in building codes are likely to be technical ones not apparent to all laymen is another element which causes a need for a preconceived procedure to handle substantive changes.

Effect of Amendments on Unity of Code: The second factor to be considered in connection with the amendment problem is the form of the amendments and their effect upon the uniformity of the entire code. The best solution for this problem is for the primary ordinance itself to provide for recodification of any and all amendments enacted during particular periods, such as two-year periods. A smattering of municipalities in Allegheny County, although their ordinances do not provide specifically for such a recodification procedure, have recodified and republished their codes after the enactment of a series of amendments.

One example of this method is the Borough of DORMONT, whose present code⁵² is a codification which embraces several amendments. Another borough, EDGEWOOD, has a code⁵³ which is a codification of three amendments enacted over a period of eight years following the original enactment. This action by EDGEWOOD may be the result of the fact that EDGEWOOD has to some extent patterned its program of building regulation after DORMONT'S; the present secretary-manager of EDGEWOOD formerly served in DORMONT.

As Element III of Table E shows, the pattern of expressly-

⁵² Originally Ordinance No. 392, April 14, 1923; Recorder of Deeds Book No. 2, p. 166.

⁵³ Originally Ordinance No. 402, April 14, 1924; Recorder of Deeds Book No. 3, p. 93.

provided amendment procedures in the county is a faulty one. No ordinances make any provision for a system which would handle complete revision of the code. The two municipalities⁵⁴ which have recodified their amendments constitute only about 5% of the 38 analyzed. While it is true that 68% of that group of municipalities have enacted no amendments, 26% of the group do have amendments of some sort.

This problem of preserving the unity of a code and preventing its usefulness from being destroyed by a series of amendments is closely related to the general problem of format and organization which is discussed in Chapter V.

C. Sources of Existing Codes in Allegheny County

Although, because of the statutory set-up, building regulation in Allegheny County appears to be a patchwork thing when examined one municipality at a time, the very geographic proximity of the political subdivisions has caused some degree of uniformity.

Element II of Table E contains the results of the Project's informal survey of sources. Because of the age of the codes the sources of 18% of the group considered are unknown; the solicitors or other officials who participated in their enactment have died or have just forgotten. The most common source discovered, as the table shows, is other municipalities in the county. About 60% of the municipalities have used this method. However, at least two of the present codes in the county are the product of an adoption by reference of a national model code. One municipality, DUQUESNE, is reported to have modeled its ordinance of 1925 upon Harrisburg's then existing ordinance. Although as mentioned previously, McKEESPORT'S and MUNHALL'S ordinances are copied after DUQUESNE'S, they have been counted as being modeled on a county municipality rather than on Harrisburg's.

⁵⁴ One or two other municipalities, including MT. LEBANON, have recodified the format of their ordinances as recorded in the Recorder of Deeds' office, but the recodified format was not contained in the published pamphlet versions supplied in answer to the requests of the Pittsburgh Housing Association; Table E is based on the pamphlet copies.

1. *Other County Municipalities as Sources*

When we examine the reasons why the most common source is that of other county municipalities, at least two factors appear prominently: (1) the influence of personalities and (2) the influence of geographical proximity.

Already mentioned has been the influence of personalities in the case of the modeling of EDGEWOOD'S code upon that of DORMONT. Geographic proximity has played a larger part. It was probably the factor which caused the similarity between the codes of McKEESPORT, DUQUESNE, and MUNHALL as mentioned above.

The outstanding example of this factor however, is a group of Ohio River boroughs, EMSWORTH, EDGEWORTH and OSBORNE. On their face the similarity of the present codes of EMSWORTH,⁵⁵ and OSBORNE⁵⁶ and the former code of EDGEWORTH⁵⁷ makes their common origin undeniably apparent.⁵⁸ (EDGEWORTH'S former code has been replaced by a new one.) According to date EDGEWORTH'S former ordinance was the first one and the other two codes were probably modeled upon it. In this connection it is interesting to note that OSBORNE'S code adopted in 1939 was apparently modeled on an ordinance of EDGEWORTH'S which was then already eleven years old.

Another geographical group, the ordinances of which have many sections in common, is made up of BRENTWOOD Borough,⁵⁹ BETHEL Borough,⁶⁰ and KILBUCK Township.⁶¹ Another group of codes whose sharing of common provisions probably results in part from their nearness on the map is made up of ETNA,⁶²

⁵⁵ Ordinance No. 447, May 2, 1929; Recorder of Deeds Book No. 1, p. 137.

⁵⁶ Ordinance No. 153, March 8, 1939; Recorder of Deeds Book No. 1, p. 38.

⁵⁷ Ordinance No. 183, August 13, 1928; Recorder of Deeds Book No. 3, p. 128. Now repealed.

⁵⁸ Emsworth officials have stated to the Project that their ordinance was modeled upon Bellevue's. However, Emsworth's code resembles Edgeworth's former ordinance much more than it does Bellevue's.

⁵⁹ Ordinance No. 460, March 2, 1946; Recorder of Deeds Book No. 1, p. 196.

⁶⁰ Ordinance No. 101, December 13, 1948; Recorder of Deeds Book No. 2, p. 50, adopted when Bethel Borough was a township.

⁶¹ Ordinance No. 6, July 19, 1949; Recorder of Deeds Book No. 1, p. 61.

⁶² Ordinance No. 672, May 15, 1933; Recorder of Deeds Book No. 3, p. 442.

SHALER Township,⁶³ McCANDLESS Township,⁶⁴ and MARSHALL Township.⁶⁵ Again notice that McCANDLESS and MARSHALL apparently modeled their ordinances upon others which were at least 12 years old. Another group in turn resembles this ETNA and SHALER group, GLASSPORT⁶⁶ and SWISSVALE,⁶⁷ and AVALON'S⁶⁸ ordinances. But these three are apparently derived from BEN AVON.⁶⁹

The effect of personalities and geographical proximity is pointed out here more than as a mere matter of interest. Having seen that similarities in the existing pattern of ordinances respond to these two factors, we are apprised that we can employ the operation of these two factors in encouraging revision of building regulation in the future where it is needed. In the next section is related an instance where these factors are already in operation.

2. *Original Ordinances*

According to reports given the Project, two codes are original products, and three others by their nature appear to be such on their face. The ordinance of FOREST HILLS,⁷⁰ a tailor-made one, was incorporated as a model in the 1931 edition of *Pennsylvania Borough Ordinances* compiled by Mr. T. F. Chrostwaite; needless to say, it is no longer an appropriate model. CLAIRTON'S⁷¹ sizable code of 1926 was drafted and presented by Mr. Vann E. Ohl; he reports that he relied on the then existing National Board of Fire Underwriters' model for the administrative provisions, but that it was otherwise an original product.

3. *Recent Developments*

Mr. Ohl today reports that CLAIRTON is considering a new code. CLAIRTON is only one of a good many municipalities in

⁶³ Ordinance No. 240, March 3, 1931; Recorder of Deeds Book No. 2, p. 219.

⁶⁴ Ordinance No. 1, June 7, 1946; not recorded.

⁶⁵ Ordinance No. 2, September 11, 1945; Recorder of Deeds Book No. 1, p. 248.

⁶⁶ Ordinance No. 313, June 20, 1929.

⁶⁷ Ordinance No. 1050, July 16, 1935; Recorder of Deeds Book No. 3, p. 468.

⁶⁸ Ordinance No. 611, June 22, 1923; Recorder of Deeds Book No. 2, p. 78.

⁶⁹ Ordinance No. 325, October 8, 1918; Recorder of Deeds Book No. 3, p. 41.

⁷⁰ Ordinance No. 13, April 18, 1921; Recorder of Deeds Book No. 1, p. 181.

⁷¹ Ordinance No. 171, March 5, 1926; Recorder of Deeds Book No. 1, p. 105.

the county which today recognize the problems of obsolescence already pointed out in this report. As a matter of fact the number of municipalities contacted during the formulation of this report which evidenced interest in revising their building regulations is decidedly encouraging. In addition to CLAIRTON, ETNA Borough and OAKMONT Borough display interest in a new building ordinance. McCANDLESS Township officials have not filed their present ordinance because they intend to enact a new one very soon.

The most promising advance in the building code pattern in Allegheny County appeared recently when first EDGEWORTH and then SEWICKLEY adopted by reference the *Abridged Building Code* of the Building Officials Conference of America.⁷² Mr. John Bailey, Borough Manager of EDGEWORTH, had studied the various national models for some time. The initiative displayed by the officials of EDGEWORTH and SEWICKLEY is an example of the influence which personalities can have in bringing about a revised system of housing regulation in the county. The fact that SEWICKLEY and EDGEWORTH almost at the same time adopted the same model code is evidence also of the fact that geographical proximity can be employed in bringing about a renovated pattern. These two factors should provide respectively the tools and the environment for encouraging all municipalities in the county to consider the defects of their present ordinances and the advantages of new ones, perhaps one or the other of several carefully organized national uniform codes.

D. Future Revision of the Building Code Pattern

1. *The Need for Revision*

Table D at the beginning of this Part, the most significant single table, represents an attempt to summarize how strongly the two principal defects, obsolescence and insufficient scope, figure in the construction regulation pattern of Allegheny County. If we gather, as Table D does, those codes which roughly are of sufficient scope to cover today's techniques of building and which also are less

⁷² Edgeworth Ordinance No. 263, September 19, 1950; Recorder of Deeds Book No. 1, p. 455 and Sewickley Ordinance No. 698, October 16, 1950; Recorder of Deeds Book No. 1, p. 478.

than 10 years old, we find that outside the City of Pittsburgh only 14% of the population is governed by such codes. And dealing with the number of municipalities which at present have codes, the percentage is only 23% not counting Pittsburgh. Furthermore this summary of codes which meet both standards is not intended to be a blanket recommendation of the municipalities in that group; the standards employed are only rough ones. The adequacy of any existing ordinance, to be found exactly, must be determined by the people of the particular municipality by measuring their ordinance, provision for provision, against the needs which exist in the community.

However, when we consider that 86% of the population outside Pittsburgh is governed by codes which do not meet even the rough measures, then the need for new codes in many municipalities is apparent.

2. Achievement of Uniformity Through Adoption of Model Codes

The first question which arises is, once the need is discovered, how can it be filled? The answer most energetically urged in this report is to consider first the national model codes. They are promising sources for three reasons.

First, they have been drawn up in the main by consulting boards possessing collectively long and intensive experience.

Second, because they are already drawn up, the drudgery, time, and expense of drafting are eliminated. Particular communities considering them need only make certain that such of their provisions as are employed are suitable and need only amend the unsuitable provisions.

Third, if all the municipalities which admit their need for a new building ordinance should be able to concur upon a single model, then the uniformity which would be very beneficial to professional builders and to the public could be achieved without the need of a legislative enactment which would take away from the local subdivisions the power to enact their own building codes and confer it upon a larger unit such as the county.

One way to achieve uniformity would be to require it by statute, have the legislature remove the building regulation power from

the local political subdivisions and empower the county to create a countywide building code or administer a state-promulgated building code.

However, accomplishing such a transfer of powers within the near future would be well nigh impossible. The loss of such jurisdiction would be heartily and successfully resisted by the local units. If countywide building code power would be difficult to achieve as a practical matter, statewide building regulation is also a doubtful solution for the foreseeable future. Furthermore, statewide building regulation should be approached warily.

So long as the power to regulate housing remains subdivided among the local cities, boroughs and townships, the value of the model codes as sources far outweighs the value of alternative sources. The use of the practice most prevalent to date, that of following the home-made ordinances of other municipalities, often serves only to perpetuate errors; furthermore, as we have seen, frequently the other municipality's ordinance is already obsolete when it is copied.

The procedure which should be followed, if a municipality decides to create an adequate ordinance of its own, is too extensive to be outlined fully here. Briefly, however, experienced boards consisting both of construction technicians and lawyers should be set up. The work should be well organized by the use of sub-committees; agreement must be obtained upon phraseology and technical standards in order to formulate an integrated code. But even if a municipality feels that it has the necessary incentive and personnel to devise its own code, this method is necessarily expensive and time-consuming. Most important, from the over-all county viewpoint, it is destructive of uniformity.

The adoption of uniform models by the local municipalities, perhaps after joint consultation, is suggested because of its advantages of saving labor, time, and money, because it is most likely to result in a better product, and because only through it can anything approaching countywide uniformity be obtained in the near future.

The fact that, as discussed in Section C of Chapter I, the Pennsylvania legislature by statute permits the adoption and advertise-

ment of a building code by reference is another compelling factor. Our courts have found that there is no constitutional bar to such a procedure. A city ordinance is not a "law" within Article III, § 6 of the Pennsylvania Constitution, which prohibits enactment of a "law" by reference. As already pointed out, the statutory provision that building codes can be advertised by reference is also a very helpful one, reducing by a great deal a cost which would be burdensome if not prohibitive.

3. *Recommendation of Specific Model Code*

A wide range of choice in model codes is available. The few which are discussed in this report include:

Abridged Building Code, Building Officials Conference of America, Incorporated, New York, N. Y. 1948. (The same organization also has drawn up a longer Basic Code.)

National Building Code, National Board of Fire Underwriters, New York, N. Y.

Recommended Building Code for Use in Borough Governments, Department of Internal Affairs of the Commonwealth of Pennsylvania and Middle Department Association of Fire Underwriters, Philadelphia, Pa. 1947.

Uniform Building Code, Pacific Coast Building Officials Conference, Los Angeles, Calif. 1949. (This same organization has also published a short form of the parent document.)

Of these uniform codes the one tentatively recommended by this report for first consideration is the *Abridged Code* of the Building Officials Conference of America, which has already been adopted by EDGEWORTH and SEWICKLEY. The many advantages and few weaknesses of this code are discussed under the appropriate headings throughout this report. Of special interest to boroughs and townships, which are not under the state plumbing statute, is the fact that this uniform code contains a section on plumbing. Outside of the technical provisions, the Building Officials' *Abridged Code* is also preferable for the good legal form of most of its administrative provisions.

A central citizens' agency should examine all the available uni-

form codes especially in the light of their applicability to Pennsylvania law. The recommendation of the Building Officials of America's Code is based on a rapid study of that code alone; time has not permitted a thorough-going study of all the potential sources.

CHAPTER IV

TECHNICAL CONTENT

Introductory Note:

At the end of this chapter is a brief evaluation of the technical requirements of the *Abridged Building Code* of the Building Officials Conference of America, the model code recommended by this report.

The rest of the chapter deals only with those technical problems which would concern a lawyer assisting in the drafting of a building code. The discussion of the exact engineering requirements which Allegheny County building codes contain and recommendations for specific technical changes in those requirements are primarily the concern of the construction engineer, and so long as they are at all reasonable, they do not affect the legality of a building code. These engineering problems have been often studied by technical experts, and there is much material available today against which the specific construction requirements of Allegheny County building codes may be measured. The first four sections of this chapter are confined to those technical aspects which are allied with problems of drafting.

A. Scope of Subject Matter Covered

1. *Allegheny County*

Table B, together with the descriptions following it, at the beginning of this Part summarizes the Project's findings as to the scope of existing codes in Allegheny County. This table embraces all the building ordinances in the county, including Pittsburgh's. The ordinances are classified into three groups, determined on the basis of subject matter covered.

Brief Fire Prevention Ordinances: The first group, into which 13 municipalities fall, constitutes about one-fourth of the 53 codes. The municipalities in this group are for the most part the older political subdivisions which surround the cities. They include only about 7% of the population of all municipalities enforcing codes, but, counting only the non-Pittsburgh area, they contain about

16% of the population. These ordinances, as the description of the group points out, concentrate on fire prevention. In the whole group there are only a few sections dealing with requirements relating to structural safety, and these requirements are in very general terms.

There is virtually no mention of requirements relating to health and sanitation, termite prevention, or other matters which have been characteristically dealt with in newer enactments. An exception is the ordinance of BRADDOCK Borough;⁷³ one of the newest in the group, BRADDOCK'S ordinance specifies heights, wall construction, and the use of glass blocks. In fact it shows a disproportionate concern for glass block construction. Because it is very brief, only about seven sections, its scope is nevertheless too narrow.

SPRINGDALE'S ordinance⁷⁴ is more typical of the group; it sets up fire limits and allows certain broad types of construction within those fire limits. The building inspector is given very broad discretion. Only in section 8 does it show any departure from this pattern; there a plumbing ordinance is incorporated by reference with added requirements. More atypical are the plumbing requirements of the Borough of EMSWORTH,⁷⁵ which occupy sections 60-79 of that borough's ordinance.

Brief General Purpose Ordinances: The second group of ordinances contained in Table B deals with more varied matters. In this group the structural safety requirements are more frequent and are set forth in greater detail. Most of them make mention of electrical and plumbing requirements in general terms. A reference to the list of municipalities which fall into this group (page 8) shows that its composition is more varied than that of Group 1. It contains the older boroughs together with some fast growing townships which, when their need of a building regulation was first felt, patterned their ordinances after the neighboring boroughs. Unlike Group 1 many of the municipalities in this group have not yet reached the full extent of housing development. On the basis

⁷³ Ordinance No. 501, March 5, 1940; Recorder of Deeds Book No. 1, p. 193.

⁷⁴ Ordinance No. 195, August 9, 1920; Recorder of Deeds Book No. 1, p. 74.

⁷⁵ Ordinance No. 447, May 2, 1929; Recorder of Deeds Book No. 1, p. 137.

of comparisons both with the more adequate codes in Allegheny County and with the acknowledged criteria represented by the national uniform model codes, the ordinances in this group also are inadequate in their scope.

A totaling of the municipalities in Group 1 and in Group 2 shows that they together constitute 61% of the number of municipalities and that, outside Pittsburgh, they cover about 42% of the population. Thus we see that a sizable proportion of construction in the outlying municipalities is covered by codes whose scope is comparatively inadequate—ordinances too narrow in their application to serve as the core of a broad program of housing betterment.

Complex General Purpose Ordinances: The third group represents the top bracket of county ordinances as far as scope is concerned. Into this group fall all the cities, the larger old boroughs, the boroughs most recently created (such as BETHEL) and a couple of townships. The ordinances grouped here, although they are not unqualifiedly endorsed by this report, still represent the closest approach to the ideal type of regulation. They are the best organized codes, and some of them employ helpful means of reference. They are longer laws physically.

Because the State Plumbing Code applies to second and third class cities, their ordinances do not incorporate plumbing requirements, but those of boroughs in this group do. (The only ordinance which has any provisions relating to tenement houses as such is one which otherwise falls into Group 2, not Group 3; it is the ordinance of BEN AVON,⁷⁶ which in sections 76-89 has requirements very much like the state's Tenement House Act of 1903, which applies to first and second class cities.)

The more recent ordinances in Group 3 evidence the broadest scope of all. WILKINSBURG⁷⁷ has sections on termite prevention which concisely set forth flexible methods. Those sections, Art. 24, §§ 1 and 2, read:

"Section 1: When protection against infestation by termites is necessary, it shall be attained by the following

⁷⁶ Ordinance No. 325, October 8, 1918; Recorder of Deeds Book No. 3, p. 41.

⁷⁷ Ordinance No. 1369, April 19, 1949; Recorder of Deeds Book No. 2, p. 305.

means which are listed in the order of their desirability:" (The section then outlines the use of (1) sheet metal termite shields, (2) lumber treated with wood preservative by the full-cell or empty-cell process or the hot and cold bath process.)

"The chemicals used as preservatives in both methods must be those which have withstood actual tests over a period of years and the methods of treatment shall be approved by the Building Inspector. Note: Brush coat spraying or dipping methods of treatments will not be acceptable.

"Section 2: In localities where, in the opinion of the Building Inspector, full protection is necessary, protection should be obtained from both . . ." methods.

2. *Scope of Recommended Model Code*

At this point a reiteration of the scope of applicability of the *Abridged Building Code* of the Building Officials Conference of America is in order because of its importance. Under section 100.2 the *Abridged Code* applies to dwellings and business buildings which are not more than three stories nor more than 40 feet in height, to accessory buildings not more than 1½ stories nor more than 15 feet in height. However the next section by reference applies the *Basic Building Code* (parent code of the *Abridged Code*) to buildings which do not come within the above limitations. Because in suburban and rural communities most of the buildings do come within the limited coverage of the *Abridged Code* and because that limitation of coverage has permitted the *Abridged Code* to be written in relatively simple terms, the restricted scope of the code is an advantage rather than a disadvantage. As a matter of fact many zoning codes in Allegheny County provide that construction within the municipality cannot exceed three stories in height anyway; in cases where such provisions exist, therefore, the *Abridged Code* will dovetail with the zoning ordinances.

With regard to subject matter, the *Abridged Code* has been recommended in the preceding chapter partly because it contains plumbing regulations.⁷⁸ Cities could not adopt this part of the *Abridged Code*, because to do so would raise a conflict with the State Plumbing Code, but boroughs and townships might find the adoption of the *Abridged Code* beneficial because of these provi-

⁷⁸ Section 117.0 *et seq.*

sions. They include requirements for inspection and the approval of plans, provisions relating to air and water tests, soil and waste lines, sewers, hangers and supports. In addition, this part of the *Abridged Code* would also provide boroughs and townships with some provisions which cover the same field as the Pennsylvania Tenement House Act does in the cities. The *Abridged Code* sets forth minimum quotas of sanitary fixtures, such as water closets, lavatories, tub and shower baths, and urinals, as does the tenement house statute. But the *Abridged Code* applies these requirements to all types of buildings, imposing different requirements for different classes of buildings.

The *Abridged Code* also regulates gas piping and air conditioning units. A list of some of the subject matter indicated in its table of contents follows:

- | | |
|---|---|
| 1. Fire Zones | 10. Waterproofing, Ratproofing, and Termite Protection |
| 2. Exit Requirements | 11. Plumbing, Water Supply and Gas Piping |
| 3. Design Live Loads | 12. Air Conditioning, Refrigeration, and Mechanical Ventilation |
| 4. Footings and Foundations | 13. Fire Safety and Fire Protection |
| 5. Wood Frame Construction | 14. Elevator, Dumb Waiter, and Conveyer Equipment |
| 6. Masonry Construction | 15. Electric Equipment and Wiring |
| 7. Chimneys, Flues, Vents and Smoke Pipes | |
| 8. Heating Equipment, Mounting and Installation | |
| 9. Requirements for Light and Ventilation | |

A cursory examination of this list serves to indicate that this *Abridged Code* covers the ground now covered by our present building codes, our plumbing statutes and tenement house statute. The scope of this code is decidedly broader than the short forms of the other national codes, although it covers some matters in less detail.

B. Specification Versus Performance Codes

1. *Definition of Types*

The manner by which technical requirements in building codes are stated has been classified roughly into two types. The type most common in Allegheny County today is the "specification" code. This sort of technical wording states the exact materials that must be used, exact methods, and often exact or approximate sizes of materials. An example is found in sections 1306 and 1307 of DUQUESNE'S building code, relating to ground floors and cellar ceilings. They state:

"Section 1306: In all the buildings, the cellar floor or any floor resting directly on the ground shall consist of 1:3:6 stone or cinder concrete, not less than three inches thick."

"Section 1307: . . . the cellar ceilings over the cellar basement shall be entirely covered with metal lath and at least three-fourths of an inch of cement or gypsum plaster, or strong fiber plaster boards not less than three-eighths of an inch thick well nailed and coated with at least one-fourth of an inch of cement or gypsum plaster or sheet metal."

The newer technical approach in building codes is the performance code, which states the results desired and omits details. An example is section 109.32 of the Building Officials' *Abridged Code*, relating to wind loads on eaves. It says:

"Overhanging eaves, cornices and other roof projections shall have adequate strength and stiffness to withstand an upward wind pressure of forty (40) pounds per square foot."

2. *Comparative Technical Advantages*

The great advantage of the specification code is that it lends itself to being unmistakably definite; however, this very definiteness makes adaptation to new materials and methods difficult. On the other hand, a performance code, although eminently flexible, is sometimes subjected to the accusation that it is nebulous. The use of an appendix or manual with a performance code helps remedy this problem by providing a handy reference of what materials currently through tests have been discovered to meet the requirements set forth in the code. When new materials and methods become available, they may be included in the appendix or manual

by the administrator, and there is hence no need to amend the code itself as is necessary in the case of a specification code where the particular materials are named within the ordinance itself.

In making a choice between specification and performance types other factors in addition to the technical problems of materials and methods must be considered. The flexibility of a performance code requires that it be administered by an alert and experienced official who is willing to supply the most up-to-date information on material test standards. Yet, if that administrator does his job well, if the ordinance is drawn up in good form as advocated by Chapter V of this report, and if the code is supplemented with up-to-date tables and reports on material standards, a performance code can still be understood by the non-professional home builder.

Most new building codes enacted today display a trend toward the adoption of more provisions modeled along performance lines. To date, no code has been devised which words all its provisions as performance requirements. Complete test standards have not been developed for all sorts of materials, and sometimes the very nature of the matter being dealt with makes undesirable a mere statement of results to be achieved.

3. The Allegheny County Picture

Although some of the ordinances in Allegheny County cannot be definitely classed as either performance or specification codes, an attempt to make a general summary is represented by Element VI of Table E (page 14). This table does not include Pittsburgh, which has a largely performance-type code. Outside Pittsburgh, in only four ordinances are detailed performance provisions predominant. The four codes which contain performance provisions of a general sort are not true performance codes in the modern sense because they do not supplement the general instructions with references to material test standards. On the other hand, only fourteen of the ordinances studied clearly fall into the class of specification codes. Eight of the 38 ordinances are so brief in nature that they cannot be properly identified as one or the other, and in six of the codes specification provisions and performance

provisions are so interwoven that a clear identification is not possible.

An example of a common provision, which strictly speaking is a performance provision, but which actually does not measure up to the modern view of what a performance code should say, is represented by section 35 of SEWICKLEY'S former code:⁷⁹

"All parts of every building shall be designed to safely carry the loads to be imposed thereon, and shall in all other respects conform to good engineering practice."

Although this sort of provision truly states only the desired results and leaves out details, it really is only precatory in force.

The need for adoption of codes which are performance codes in the modern sense is apparent in many Allegheny County municipalities. Those codes which are so general as to be identifiable neither as a specification or performance code simply do not meet the technical problems which they must meet. And those which are true specification codes, are, in most cases, so obsolete that the materials and methods which they specifically require are out of tune with present-day building practice. Where the codes are loose and general, the requirements are not adequately defined; where the specification codes are too strict, flexibility has been introduced into the building program by administrators who feel compelled to ignore the exact terms of the ordinance because they are unreasonable. In either case the result has most often been to give the administrative officials too much untrammelled discretion in the administration of such ordinances. These matters will be dealt with more fully in Section D of this chapter and in Chapter VII, which discusses the legal problems surrounding administrative discretion.

C. Methods of Including Standards

Much of the quality of the technical provisions of the building code depends on the extent to which it uses standards of materials and methods developed by specially-equipped national organizations. Some examples of the sources of standards by which materials and methods may be judged are the American Society for

⁷⁹ Ordinance No. 472, July 5, 1916. Now repealed.

Testing Materials, the federal government's Specifications Board, the Department of Commerce's National Bureau of Standards, and the standards compiled by trade associations such as the American Concrete Institute. Because these standards have been developed by groups which have special knowledge and equipment for dealing with them, it would be folly to try to define a construction program without trying to make use of them.

The primary problem in the application of standards is the method by which the standard shall be included in the code. Several alternatives are available. They fall into two broad classes: (1) those means of using standards which give the standards the force of law and (2) those means by which the builder is referred to standards in order to advise him how he can meet the performance requirements of the code itself.

If the standards are to be given the force of law, they can be (1) fully expressed within the ordinance, (2) incorporated into the ordinance by reference, (3) expressed or adopted in the administrator's regulations.

If strict adherence to standards is not required as a matter of law, the standards can be used as advisory sources by (1) enumerating them by reference in the ordinance in a section which states that following such approved authorities is recommended rather than required for compliance with the performance requirements, (2) by enumerating them in a similar manner in administrative regulations, (3) by making them available to the public in a library in the building safety department, or (4) by compiling them in a convenient manual.

An intermediate means is to make adherence to specific approved standards not mandatory but rather only evidence of safe practice or compliance.

Combinations of methods are possible. Pittsburgh's code is a good example. Section 301(c) reads:

"Section 301(c): All persons may use the materials, methods of construction and equipment:

- (1) As allowed in this Code
- (2) As actually listed in the rules and regulations
- (3) As allowable for inclusion in the rules and regulations

under the provisions of this chapter, by reason of approval by one of the list of authorities or by reason of approval by the Board of Standards and Appeals without further showing such materials, methods and equipment will meet the required standards."

The next section lists the approved authorities whose standards are "applicable." Then section 303 requires those who wish to use methods and materials other than those approved under section 301(c) to furnish "authentic proof" that such alternate methods or materials will meet requirements.

A description of the principal means of employing standards follows:

1. Recitation of Standards in Full in the Text

Including nationally-formulated standards in the code by setting them forth in full is impractical and seldom done; in Allegheny County there are at least two sections which are exceptions, however. When the standards by which materials and methods are to be judged are homemade ones, they naturally are included verbatim in the code.

Tabulation of this facet of building codes in Allegheny County is very difficult. Table E, Element VII (page 15) makes the analysis according to sections of ordinances rather than entire ordinances because some codes use different methods of including standards in different sections. In the table the number of sections has been transposed into percentages of the total number of entire ordinances analyzed. Element VII shows that 23 sections were found which recite standards in full; because each one of these 23 sections was in a different code, the table also shows that hence 60% of the ordinances analyzed contain at least one section which recites standards in full. These ordinances make no provision for changing these standards, other than by amendment of the ordinance.

Most of these sections occur in codes which are primarily specification codes and thus the standards recited in full are locally-drafted ones. But there are at least two sections in as many codes which recite parts of nationally-formulated standards in full. These

are found in the codes of WHITEHALL,⁸⁰ where section 1 of article XII sets forth the lumber stresses recommended by the Forest Products Laboratories, and MOUNT LEBANON,⁸¹ where many standards which appear to be national ones are set forth in full, although the sources are not named.

2. *Incorporation of Standards by Reference*

Where standards formulated by national technical organizations are used, they are most often incorporated by reference. In Allegheny County the newer codes employ national standards widely, and many of them use this method of inclusion. About 55% of the ordinances analyzed contain at least one section which employs this method of incorporation; most of them do not, however, make any provision for changes of the standard. Some examples are the code of WEST MIFFLIN,⁸² which in section 800 incorporates the "building regulations for reenforced concrete of the American Concrete Institute" and in section 900 incorporates by reference the American Institute of Steel Construction's standards, and the code of WILKINSBURG,⁸³ whose article XXX requires heating systems to comply with the rules and regulations of the National Board of Fire Underwriters. The codes of THORNBURG⁸⁴ and FOX CHAPEL⁸⁵ have similar sections.

The disadvantage of using this method of incorporation by reference is that the specific standards or publications referred to soon become obsolete. And a statement that the standards "as amended from time to time" shall apply can be operative, only where adherence to the approved standards is not a requirement having the force of law.

3. *Current Standards Set Forth in Administrative Regulations*

A method used by comprehensive building codes today is that of stating fundamental results and empowering the administrative

⁸⁰ Ordinance No. 10, January 1, 1948; Recorder of Deeds Book No. 3, p. 346.

⁸¹ Ordinance No. 880, March 27, 1930; Recorder of Deeds Book No. 3, p. 296.

⁸² Ordinance No. 80, October 4, 1949; Recorder of Deeds Book No. 3, p. 182.

⁸³ Ordinance No. 1369; Recorder of Deeds Book No. 2, p. 305.

⁸⁴ Ordinance No. 106, September 11, 1944; Recorder of Deeds Book No. 2, p. 242.

⁸⁵ Ordinance No. 4, November 22, 1934; Recorder of Deeds Book No. 3, p. 199.

staff from time to time to make rules which set forth the national standards to be used as guides. This is one of the methods employed by Pittsburgh's code, which says in section 301(b):

" . . . the superintendent . . . shall compile a set of 'rules and regulations for the Building Code'. . . . The rules and regulations shall consist of a list of materials, methods and equipment which are acceptable as meeting the requirements of this code, together with pertinent specifications and data. . . ."

Section 302(a) then lists a long series of national authorities and the construction matters to which their standards shall be applied. Remarkably enough, one of the older codes in the county, the code of CLAIRTON⁸⁶ uses much the same method in section 11(e). Altogether in Allegheny County about seven (18%) of the ordinances studied contain a section which uses this method or a variation of it.

4. *Use of Standards Not Required But Made Evidence of Safe Practice*

Some building codes of the performance type, after stating the fundamental results desired, then mention specific standards and state that the use of these standards, although not required, "shall be considered *prima facie* evidence of safe practice." No sections in Allegheny County building codes were found to employ this method.

5. *Publication of an Advisory Manual*

Where the approved authorities' standards are not made mandatory but are merely recommended to the builder as an advisable means of attaining compliance with the provisions of a performance code, the standards may be compiled, in full, in a published manual which is distributed along with copies of the building code itself. The contents of such a manual are not enacted, either expressly or by reference, as part of the building ordinance. Nor is there any need for embodying the contents of the manual in official administrative regulations. The building code and its performance requirements are the legal commands; the manual is simply ad-

⁸⁶ Ordinance No. 171, March 5, 1926; Recorder of Deeds Book No. 1, p. 105.

visory. As such, it can be revised at any time without amending the ordinance itself. The manual can be set up in loose-leaf format.

The use of such a manual, however, is confined to those larger municipalities which could afford the cost of publication. In the case of smaller political subdivisions, the building inspector can achieve a similar result if he supplements his performance code by maintaining a library of current standards and by issuing regulations which provide builders with a list of the authorities.

6. Conclusion

Careful presentation of auxiliary standards is necessary to aid builders in complying with performance-type codes. Most building safety administrators will find that they can work out a combination of means which will serve the peculiar needs of their community. Where there is no intent to enforce adherence to particular standards, the publication of an advisory manual is a convenience, if possible. The best single solution, however, is giving the administrator (or an administrative board) controlled rule-making power to adopt current standards.

D. Flexibility; Adaptation to New Materials and Methods

The closely related problems of specification-or-performance codes and methods by which test standards are included are in turn closely allied with the more general problem of flexibility. The use of a performance code and the use of national standards which may easily be changed from time to time are two of the principal means by which flexibility may be obtained. There are other methods, those discussed here. Because of the difficulty of using the legislative amendment process to keep a building code up to date, whatever flexibility is attainable usually must be obtained through a wise administrative plan. The Pittsburgh building code sets up in section 305 a Board of Standards and Appeals consisting of an architect, builder and engineer, which, in addition to hearing appeals from decisions of the building superintendent, is also to pass upon "all matters referred to it by the superintendent in accordance with the provisions of this Code." As section 301(c), previously discussed, indicates, the Board of Standards and Appeals

may approve materials, methods of construction, and equipment which will meet the performance requirements of the code. This power is more specifically outlined in section 302(b), which reads in part:

"The Board of Standards and Appeals shall be authorized to approve such materials, methods, and equipment for use . . . on the basis of such material, method, and equipment providing the same factor of safety as the conventional material, method or equipment it substitutes for or most nearly resembles."

A common method of achieving flexibility during World War II was the addition of an amendment to many building codes which authorized approval, temporarily because of war conditions, of substitutions for certain materials required by other provisions of the ordinance. Although such a provision, especially in a specification code, is open to the judicial objection that the administrative discretion is not sufficiently defined, this sort of amendment was upheld by a lower court,⁸⁷ which said that such a provision did not constitute an unlawful delegation of power.

The employment of administrative discretion in connection with performance-type provisions is common and easily achieved. In article 10 of MOUNT LEBANON'S code dealing with fire resistance standards, there is a provision that the building commissioner may approve materials which have been tested. The approval procedure and tests are described and some materials are specified.

A whole new field requiring flexibility as to material has opened up with the advent of prefabricated construction. With regard to this type of assembly the *Abridged Code* of the Building Officials of America says:

"Section. 105.4 PREFABRICATION. Prefabricated assemblies not capable of design by accepted engineering analysis shall be subjected to the same tests required for at-site construction or their equivalent. When prefabricated assemblies are not readily accessible for inspection at the site, the licensed engineer or architect or other authorized and approved representative of the manufacturer shall furnish a verified report of inspection. . . ."

⁸⁷ Commonwealth v. Campbell, 29 Erie 113 (Pa. 1946).

A few building ordinances in Allegheny County have special provisions dealing with prefabricated construction. The most recent newcomer to this group is the Borough of FOX CHAPEL, which in 1950 amended its Ordinance No. 4 to include performance provisions governing the erection of pre-fabs.⁸⁸

Looking at the general picture in Allegheny County outside Pittsburgh, we see that, although a few codes contain sections which provide flexibility, too many are devoid of any sections which would promote full use of new materials and methods. Element VIII of Table E (page 15), like the previous element, represents a summation of codes containing at least one section of a particular sort. About eight (21%) of the 38 codes contain at least one section relating to adoption of new materials which is definite in its terms and yet provides for flexibility. A majority, over 47%, of the ordinances contain at least one instance of flexibility. However these, in most cases, are merely isolated sections and do not fully provide the code in which they are contained with a comprehensive system for adaptation to materials and methods other than those particularly specified. Examples of these sorts of isolated provisions are contained in the like codes of McKEESPORT, DUQUESNE, and MUNHALL. The McKEESPORT code⁸⁹ at section 603 says that fillings between floor beams and girders "shall be one of the fireproof systems in use as approved by the Supervisor of Building." Another example is section 913 of the same code, where the Supervisor of Building may permit "lime mortar instead of cement lime mortar" to be used in the construction of walls.

As also indicated by Element VIII, four ordinances contain sections which, although intended to provide flexibility, were too indefinite. The fault of indefiniteness of these ordinances lies largely in the fact that, although they contain some provision for allowing the use of alternative materials and methods, they do not contain any provision requiring the administrator to incorporate his approval of such substitutes in the form of rules.

On the other hand 26% of the ordinances analyzed were con-

⁸⁸ Ordinance No. 97, April 14, 1950; Recorder of Deeds Book No. 1, p. 531.

⁸⁹ Ordinance No. 813, December 28, 1925.

sidered too rigid because they were wholly specification codes, or because they had no provision at all for administrative rule-making or approval of new materials. Where the ordinance itself is too rigid, flexibility is nevertheless obtained, but by procedures outside the provisions of the law. Several municipalities have been allowing Gunnison Homes because, although they do not meet the exact code requirements, they are nevertheless considered safe. One municipality reports that where unduly restrictive provisions of the ordinance are encountered, the building inspector will deny a permit for the use of equally fit materials, and the council will routinely upon appeal to it reverse the building inspector and allow a permit on an *ad hoc* basis. Where flexibility is written into the law itself, the administration of such cases is much more convenient. A building inspector with a technical expertise gained from experience is more qualified to approve the use of alternative materials and methods than is council; as a matter of fact, where the sort of informal appeal to council mentioned above is used, the council relies upon the advice of the building inspector anyway.

Whether a specification or performance type of code is in force, municipal authorities should assure themselves that the ordinance itself contains a legally defined procedure for allowing the use of newly developed materials and methods. The approval of such alternatives should be the province of the administrative staff. When the administrator confers such approval, his ruling should be preserved in the form of a regulation which will continue to apply to all similar situations until the regulation is again revised. The example of the City of Pittsburgh, which as has been stated employs a Board of Standards and Appeals working jointly with the building superintendent, is a model of the ideal sort of provision for flexibility.

E. Brief Comparative Evaluation of Recommended Model Code

The preceding chapter of this report tentatively recommends the *Abridged Building Code* of the Building Officials Conference of America as a model code suitable for adoption by boroughs and townships in Allegheny County. Here is presented a brief evaluation of a few of the technical points of that code. The bases of

comparison used are some of the findings presented by Howard P. Vermilya in an article on building codes written for the American Public Health Association, as yet unpublished. Mr. Vermilya points out a number of technical deficiencies which are common in building codes. In this section these are headed with the caption *Deficiencies*. Beside each such point is a brief summary of how the *Abridged Code* handles the matter; these summaries are headed *Abridged Code*.

DEFICIENCIES

1. Many building codes require masonry walls to be a minimum of 8" thick for structural safety. Yet 6" masonry walls are adequate for one story construction.

2. Building codes commonly require minimum sizes of 2"×8" or even 2"×10" for all wood floor joists. Sizes of 2"×4" or 2"×6" are enough for some floor members.

3. Some codes set the maximum spacing between joists, rafters and studs without any regard to the loads which they are to support or the material used.

4. Too many codes stipulate minimum ceiling heights which are much higher than necessary. A ceiling height of 7'10" is considered sufficient for inhabited rooms.

5. Live load requirements are often too high; some require residence floors to be able to sustain 40 to 60 pounds per square foot. The F.H.A. says that a live load requirement of 30 pounds per square foot is safe enough for floors on which there are only bedrooms.

ABRIDGED CODE

Section 112.11 permits 6" masonry walls in one story and one and one-half story dwellings which do not exceed stated height limits.

The Abridged Building Code uses performance standards which permit the use of smaller members if they are more closely spaced.

Tables 8, 9, 10, and 11 take into consideration both factors, the loadings and the size of material, in setting the maximum spacing.

In section 101.0 the minimum habitable room height is defined as 8' in basement rooms, 7½' for first story rooms and 7⅓' for second and third story rooms.

According to section 109.1 the live load requirement for the first floor of dwellings is 40 pounds per square foot and only 30 pounds per square foot for other floors of dwellings.

DEFICIENCIES

6. Some codes have the extreme fault of not making any distinction between load-bearing and non-load-bearing partitions. Non-load-bearing partitions comprise less than 50% of residential construction.

7. Many codes fail to require ventilation of walls, attics, and crawl spaces for the purpose of preventing condensation.

8. Fire escapes should not be given undue importance as fire exits; other factors and means should be considered. Experience has shown that fire escapes alone do not provide adequate exits.

9. A building code should not exclude the use of plywood, gypsum board or composition board for interior finish. Too many codes permit only lath and plaster.

10. The requirement that two exits be available to all family units in multiple-family residential buildings should relate only to 3 or 4-story structures. Two-story garden-type apartments do not require two exits for each family.

11. Building codes which require clearances between heating equipment and combustible walls often do not take into account the possible use of insulating materials which might decrease the clearance necessary.

ABRIDGED CODE

The *Abridged Building Code* differentiates between load-bearing and non-load-bearing partitions throughout.

Section 115.3 requires attics to be vented, and section 115.4 imposes similar requirements for crawl spaces.

Section 108.0 does not rely upon fire escapes as the sole safety device. The note to that section points out the complexity of the fire exit problem and the necessity of taking all factors into consideration.

Section 111.82, which deals with interior finish, does not specify particular materials. It does prohibit the use of materials which are more combustible than wood, but otherwise it contains only performance requirements. Section 105.0 provides for the approval of new materials which can meet tests.

Sections 108.21 and 108.23 do not require secondary exits for dwellings having up to three stories and not more than six dwelling units, if certain other conditions of size, occupancy and construction are met.

Section 114.3 says that the specified clearances between heating equipment and walls may be decreased if insulating material or baffles are used.

DEFICIENCIES

12. It is not necessary to require that heating equipment rest on masonry foundations if the design of the heating equipment is such that the combustion chamber is not dangerously close to the floor, as where furnace blowers are installed below the combustion chamber.

13. The requirement that all foundation walls be made of concrete is too stringent. Foundation walls of unit masonry construction or of pier and curtain wall construction or floating slab construction are satisfactory.

14. Many codes fail to provide for the use of prefabricated construction.

15. Many building codes prohibit the use of such sheet materials as plywood to frame construction in bracing. These codes fail to recognize the strength of sheet materials. The Forest Products Laboratories have shown that $\frac{1}{4}$ " plywood if adequately nailed provides greater rigidity than 1" board laid diagonally or 1" board and bracing.

These comparisons which relate to scattered technical provisions of building codes demonstrate that the Building Officials Conference of America's code measures up creditably.

ABRIDGED CODE

Section 114.0 specifies furnace mountings and floor clearances which vary with type of equipment. Approved appliances may be mounted in accordance with the recommendations of national testing agencies.

Masonry unit, pier pile, or floating slab foundations are not barred by section 110.0.

Section 105.4 allows the use of prefabricated construction under controlled conditions.

In addition to section 105.0 which provides for approval of new materials, section 111.5 expressly allows plywood as an alternative for diagonal wood exterior sheathing. Section 111.5 also refers to the nailing schedule for sheathing, which is contained in the appendix.

CHAPTER V

FORM OF BUILDING CODES; ORGANIZATION, CLARITY, EASE OF REFERENCE

A. Ideals of Draftsmanship and Format

1. *Need for Careful Draftsmanship*

In the past not enough attention has been given to the purely mechanical aspects of legislation drafting; this omission has been most often made in the creation of local ordinances. The subject matter of most ordinances is not so involved that a carefully-planned format is required, but the outstanding exceptions are building codes and zoning codes.

A building code, which is one of the most technical sorts of local legislation, is by its nature difficult both to draft and to read. The conscientious planner cannot take refuge in the legal maxim that ignorance of the law excuses no man. The purpose of regulating the various aspects of housing is primarily to carry through a constructive program rather than to entrap an unwary citizen who, in his confusion, fails to observe some of the provisions of a jumbled building code. The first man to be considered, then, is the citizen subject to the code. Every precaution should be taken to insure that the code is properly organized, clearly worded, and provided with devices which will permit him to refer from one pertinent part of it to another.

Secondarily, an ordinance which possesses a neat mechanical structure will prove beneficial also to the officials administering the code. They may become familiar with its provisions more quickly. They need not apologize for hidden or obscure provisions. And, as Chapter VI of this report shows, if a well-drawn code comes before a court of law in the process of litigation, the court will be able to uphold the provisions as written.

The mechanical structure of a code cannot, of course, be considered entirely apart from its substantive provisions. The organization of the code is merely a vehicle for the embodiment of those provisions. The particular sort of physical organization chosen necessarily depends upon the content of the ordinance; hence there

is no one master outline which can be proposed for all ordinances.

But greatly needed is a consciousness on the part of lawmakers that the problem of organization and clarity exists, exists as a problem worthy of separate consideration. The feeling that the physical organization of an ordinance is mere child's play beneath the talents of legislators or their advisory committees is a mistaken one, because the quality of the form affects the quality of the substantive provisions contained in them; outlining the form is an integral part of lawmaking itself.

After all, unless the actual program which has been formulated in the lawmakers' minds is *communicated*, then no true program actually exists at all. This chapter deals with these problems of communication.

2. *Clarity of Language*

The smallest unit of communication in a building code is the separate word. As pointed out in Chapter III, if a municipality sets about to draft its own original code, agreement upon phraseology between the various sub-committees is one of the first steps to be achieved. Successive tentative drafts of a proposed code must be screened carefully both for outright errors and for ambiguous phrases. The substitution of "feet" for "inches" or "maximum" for "minimum" in a building code can cause confusion in the administration of the finished product; because they are patent errors, they would not be enforced literally either by an administrator or a court, but such needless errors are symptomatic of a careless approach in general.

Legally-trained members of consulting committees can bring their experience to bear where words which have been already construed and defined by the courts are used. Such words as "nuisance," "remedial," and "retroactive" have definite legal connotations acquired through litigation and relitigation; if used, such words should be used only in the sense which has been attached to them by the courts of the state. The importance of careful choice of words and even punctuation when ordinances are being reviewed by a court is dealt with at greater length in Sections A and B, Chapter VI of this report.

A helpful adjunct to the problem of phrasing is a definition section or article at the beginning of the code; all the model codes and most of the longer codes in Allegheny County employ one.

3. *General Plan of Organization*

Also among the first steps in drafting a code is the matter of the general plan of its organization. This is also a factor to be kept in mind when examining model codes for possible adoption. In the main there are two broad types:

(1) An arrangement of the code based on subject matter—in this sort of code the principal divisions will be headed “Design Live Loads,” “Footings and Foundations,” “Masonry Construction,” and the like. An example of a code which follows this plan of organization is the Building Officials Conference’s *Abridged Code*; the model code of the National Board of Fire Underwriters is similarly arranged.

(2) Another arrangement is one based on types of occupancy—this sort of code is really a series of miniature codes, each one applicable to a distinct class of buildings according to use. No code is wholly organized upon this plan. Those which have adopted it always contain, in addition, parts which relate to subject matter classifications which affect all types of occupancies; also necessary are separate divisions dealing with administrative, enforcement, and engineering specifications. The most prominent current example of this method of organization is the *Uniform Building Code* of the Pacific Coast Building Officials Conference.

Although the occupancy arrangement would seem at first glance to lend itself better to a housing program concerned with broad social considerations, the choice is not to be so simply resolved. As a matter of fact the advantages of either type of organization are about even.

The strongest point of the occupancy arrangement is that a builder, knowing what type of structure he is about to erect, need refer chiefly only to that one section or article which is headed with the name of the type of occupancy he is interested in; he may ignore the provisions relating to all other occupancies. Nevertheless, he must still take cognizance of all the general sections, those

relating to administration, enforcement, and general fire and structural safety sections, so that in the end the advantage is chiefly contained in the fact that reference to inapplicable occupancies is eliminated. On the other hand, those who draft a code along occupancy lines constantly are faced with a decision whether to duplicate similar requirements under each occupancy heading or to increase the number and size of the general provisions. In effect this type of code places a greater burden on the drafters of the code and probably, in most cases, lightens the research job of the person who intends to act under the code.

The subject matter type of arrangement, on the other hand, eliminates most of the need for repetition of particular requirements and thus may shorten the total length of the code. Because there are more different units of subject matter than types of occupancy, the number of principal sections will be increased however, and the user of the code will have to read a greater number of provisions. But, if well drafted from the outset, this sort of code can be equally as convenient to use as an occupancy code.

Which choice is taken, then, is relatively unimportant. But once one method or the other is chosen, then that plan of organization must be adhered to consistently as far as possible. If the draftsmen are willing to undertake the greater labor involved in drawing up an occupancy type code, they must be willing to assure themselves that each occupancy division is an integrated one, that it contains all the provisions peculiar to that type of use and no unrelated provisions. If the subject matter arrangement is employed, then related requirements must be grouped coherently under a series of general headings. A subject matter code need not be a mere string of requirements arranged alphabetically or by some other non-germane method.

Subsequent Organizational Problems; Amendments: As has been pointed out previously, the problem of organization and format does not end when the original code is finally promulgated. A code which is well drafted at the outset will soon be reduced to a shambles by a series of indiscriminately constructed amendments. The arguments advanced in Section B of Chapter III are applicable here. Subsequent amendments must be drafted with one eye on

the master plan of organization, then periodically incorporated into the published code by recodification.

4. Reference Devices

The fact that the general plan of organization is closely related to the substance of the ordinance has been mentioned above. One step further removed from the actual content of the code is the problem of reference devices; but these devices, a numbering system, table of contents, index, and appendix, are nonetheless important in the actual use of the code.

Numbering System: Attaching numbers and headings to the provisions of the code seems to be a matter of flimsy import. However, the numbering system serves two very useful purposes. First, it indicates the relationship between principal and subsidiary matter. If "Chapter 25" deals with "Wood" and if all subdivisions of that chapter are sections numbered from 2500 to 2599, then it is apparent that "Section 2503, Allowable Unit Stresses" deals with the allowable stresses of lumber, not of some other material. Second, a numbering system performs the more obvious function of providing a symbol by which a particular section may be identified for the purpose of one's own notes or communication with others.

As in the case of general organization, the particular numbering system chosen is unimportant if consistently followed through. If a municipality uniformly employs an adequate numbering system of its own devising in other ordinances, especially its zoning code, then that numbering system may well conform to the building code. The most common system employed today consists of dividing principal parts of a code into articles numbered by Roman numerals with the sections under each article numbered in corresponding Arabic numerals. The National Bureau of Standards illustrates this system as follows:

Article VIII Construction

Section 800 Workmanship

Section 801 Excavations

1. General

2. Support of neighboring buildings and structures

(a)

(b)

(c)

Less commonly employed are the various decimal systems, an example of which is:

Article 8 Construction

8.1 Workmanship

8.1.1 Workmanship on Wood Frame Structures

8.1.2 Workmanship on Welded Structures

8.1.3 Storage of Concrete Materials

The National Fire Underwriters' code uses the type of numbering first illustrated here, and the *Abridged Code* of the Building Officials Conference uses a variation of the decimal system.

Table of Contents and Index: The desirability of a table of contents and index requires little discussion. Both should be used; one is not a substitute for the other. As pointed out in Section B of Chapter II, the ordinance recording statutes of 1949 *require* an index.

Appendix: An innovation among reference methods in building codes is the use of an appendix to add explanations, tables of test data, diagrams showing approved practice, and other supplementary materials. The appendix of the Building Officials' *Abridged Code* contains lists of accredited authorities, accepted engineering practices, fire resistive ratings, diagrams of construction details, tables from the *Basic Building Code*, and a nailing schedule.

B. Form of Allegheny County Building Codes

1. *Details of Draftsmanship*

The minor details of draftsmanship in ordinances in Allegheny County are neither remarkably good nor remarkably poor. One word with a particular judicial connotation has been used indiscriminately, the word "nuisance"; this one word gives rise to complex legal problems which are discussed in full in Chapter VIII of this report.

The certified copies of building codes which Allegheny County municipal officials have rendered to the Recorder of Deeds' office have in some cases been unsatisfactory ones. If recording under the statute is to serve a useful purpose, the certified copies given the Recorder must be at least as carefully proofread as the draft which is contained in the municipality's own ordinance book. The

recorded version of WILKINSBURG'S code⁹⁰ loses much of its value because it contains many typographical errors which the Recorder's office, of course, is not empowered to correct; on the date the Project last examined the record books no penalty provisions had been recorded at all. This difficulty in WILKINSBURG'S case may be explained by the fact that the code in question was enacted only shortly before the statute imposed the recording requirement; the lack of time probably was the cause for the unavailability of a polished copy.

2. *Organizational Plans Used*

The general plans of organization presently employed in Allegheny County vary. Among county codes there are examples both of occupancy and subject matter arrangements. The fact that different systems are employed by different municipalities contributes to the lack of uniformity. Element IV of Table E, page 13 at the beginning of this Part, summarizes the county pattern of organizational methods. No codes in the county are organized entirely according to occupancy—an impossible feat anyway. But 13% of the 38 codes analyzed make occupancy the chief basis of organization. Most common is the use of the subject matter method, for 29 municipalities, almost $\frac{3}{4}$ of the 38 studied, make subject matter the principal basis. But at least four of the existing ordinances in the county follow no organizational pattern at all. One example is the ordinance of MOUNT OLIVER,⁹¹ which, although brief, is very badly organized; many of its sections cover varied subjects.

The recorded version of WILKINSBURG'S ordinance, in addition to having the typographical errors mentioned above, is also poorly organized. At least in the record book, Article II, which is labeled "Definitions," includes provisions relating to application for permits; and Article IV, headed "Fees and Requirements," contains the definitions which should be in Article II. Probably the municipality's own published version of this ordinance has by now been corrected, but the recorded version remains mixed up.

⁹⁰ Ordinance No. 1369, April 19, 1949; Recorder of Deeds Book No. 2; p. 305.

⁹¹ Ordinance No. 238, 1926; Recorder of Deeds Book No. 2, p. 230.

For some reason the recorded version of PENN Township's code⁹² also is not recorded in proper order; the first chapter, containing the administrative provisions, is entered last in the record books. A contrasting example is provided by CLAIRTON; although its content is largely obsolete, the legislative and administrative provisions of that city's ordinance⁹³ are well arranged in both the recorded and published versions.

In many cases, especially in the shorter ordinances, the substantive content has warped the organizational pattern; for instance, EDGEWOOD'S ordinance⁹⁴ is arranged largely on the basis of subject matter, but section 402 is headed "Factories"; this apparent departure from the organizational pattern is the result of the fact that, as to factories, the ordinance states no general rules but makes the issuance of permits subject to the approval of council or committee of council.

The extent to which amendments have impaired the organizational pattern of Allegheny County ordinances has been discussed in this report's Chapter III Section B.

3. *Reference Devices Locally Employed*

Because intensive use of the reference devices discussed in the previous sections is a practice which has grown up recently, Allegheny County building codes, being generally older than average, rarely use them. A glance at Element V of Table E shows that the great majority of county codes employ no means of reference, that only two of the 38 examined use both an index and a table of contents, two use a table of contents and appendix, and only five more have a table of contents alone. PENN Township's ordinance goes the table-of-contents device one better however; it has a separate table of contents heading each chapter. BELLEVUE'S code, although it is one of the older ones, is over-all the most convenient to use in its published version; it has a neat table of contents and a fairly comprehensive index.

⁹² Ordinance No. 523, October 27, 1949; Recorder of Deeds Book No. 2, p. 352.

⁹³ Ordinance No. 171, March 5, 1926; Recorder of Deeds Book No. 1, p. 105.

⁹⁴ Ordinance No. 402, April 14, 1924, as amended through March 14, 1927; Recorder of Deeds Book No. 3, p. 93.

A common problem which appears in Allegheny County is that of how to indicate cross-references to other ordinances. Most of the local codes have at least one cross-reference to another ordinance dealing with plumbing or health or zoning. In most cases incorporating the entire ordinance referred to in a building code would be impossible and distracting. The ultimate solution to the elimination of references to other ordinances could be accomplished only by devising in lieu of a building code a comprehensive "housing code," which would include health ordinances, multiple dwelling ordinances, nuisance ordinances, and building code in a master codification. The beginnings of this movement may be seen in the city housing code of Baltimore, Maryland, which covers the elements mentioned with the exception of the building code. In the future when housing is more clearly recognized as a distinct field of governmental regulation, this sort of compilation of all the ordinances affecting the various subsidiary aspects of housing may become common. Recommendation of such a move at this time is beyond the scope of this study.

CHAPTER VI

JUDICIAL REVIEW OF BUILDING CODES IN PENNSYLVANIA

A. General Judicial Requirements

The courts have required that building ordinances, like all other municipal laws, meet three general abstract criteria. They must possess certainty; they must be reasonable; they must be non-discriminatory and of uniform application.

1. Certainty

In *Commonwealth v. Corson*⁹⁵ an ordinance of the Borough of Norristown was at issue. The sections of the ordinance which the court discussed read as follows:

"Section 1: That hereafter . . . a permit for construction is required before any person . . . may begin to erect any building (except sheds), outbuildings, stables, and additions altogether on private property and none over one story high nor intended to hold assemblages nor mechanics and work people at regular employment.

" . . . Section 6: All buildings hereafter erected shall have all outside or division walls constructed of stone, brick, concrete, iron or other hard, noncombustible material . . . ; provided that this ordinance shall not refer to nor prevent the erection of two-story frame buildings back of and attached to any tenement or dwelling house of brick or other noncombustible material, nor to water closets in private yards nor to work-shops, carriage houses and stables fronting upon alleys and not over one story high."

Reading these two sections together, the superior court held the ordinance invalid because it was "insensible." The court was unable to determine just what buildings were prohibited. The court also said that the ordinance was unclear as to whether or not its requirements applied to buildings "not over one story high."

"From an examination of these two sections, a citizen of Norristown desiring to erect a building was to determine, at his peril, whether or not his proposed building was to be subject to all the

⁹⁵ 36 Pa. Super. 7 (1908).

oppressive restrictions contained in this remarkable ordinance," the court stated.

The courts are wholly justified, of course, in requiring that ordinances be phrased so that the builder may know what is required of him. An example of hurried phrasing appears in section 7(a) of SPRINGDALE'S building ordinance:⁹⁶

"No building or addition or part thereof or structure shall be constructed without the above described limits but within the limits of the borough without the approval of the Building Inspector first had and the permit issued therefore, and the same shall be constructed in keeping with the provisions of this ordinance as near as can reasonably be done and especially so in congested sections of the borough."

This little gem is not a model of what legal jargon should be. The use of the phrases "*without* the above described limits," "*within* the limits of the borough," "*without* the approval of the Building Inspector" is confusing enough. The use of the word "same" in the latter part of the section is vague because it at first glance may refer either to the "permit" or to the more distantly removed word "building." Such slipshod drafting can easily be eliminated by the use of care.

Even the punctuation should be carefully observed. The ancient theory of the common law lawyer was not to use any punctuation in his conveyances of land because he did not want his client's estate to hinge upon a comma. Today the use of careful punctuation is more acceptable in legal circles. A sample of the confusion which may arise where punctuation is wrongly used is section 4 in the published version of CLAIRTON'S code:

"This Code shall apply to all alterations, ordinary minor repairs necessary for the maintenance of buildings or structures, or of the plumbing, drainage or piping thereof, may be made without permit."

A second reading of this section is enough to show that a period or semicolon in place of the first comma would clarify matters. The code requires a permit for making alterations. Ordinary minor repairs may be made without permit. But had an additional

⁹⁶ Ordinance No. 195, August 9, 1920; Recorder of Deeds Book No. 1, p. 74.

word, such as "additions", been used in the ordinance above, a court construing the ordinance would have been puzzled indeed. The ordinance might have read:

"This Code shall apply to all additions, alterations, ordinary minor repairs necessary for the maintenance of buildings or structures, or of the plumbing, drainage or piping thereof, may be made without permit."

In such a case the punctuation error would have given a court considerable difficulty in deciding whether "alterations," like "additions," came under the Code or were outside the permit requirement, like "ordinary minor repairs."

2. Reasonableness

The courts have many times reiterated that building and zoning codes must be reasonable. In general any means which a local legislative body chooses in order to attain a certain object must be a reasonable and appropriate means for the attainment of that object. Some of the older cases⁹⁷ in Pennsylvania have stated that, although fire prevention was a proper purpose of construction regulation, a community which was largely rural in its nature was being unreasonable when it barred the building of frame houses altogether within its limits. Since the passage of statutes⁹⁸ which specifically allow prohibition of wooden structures, the question has not been litigated.

One salient legal problem which may be classed under the general heading of reasonableness is the question of whether or not building codes may include minimum floor area requirements for the interior of dwellings. Because two municipalities in Allegheny County, FOX CHAPEL, and MOUNT LEBANON have recently added such restrictions to their zoning codes, this question will be discussed in detail in connection with zoning ordinances, Part Two of this book.

However, because such minimum floor area requirements may

⁹⁷ *Kneedler v. Norristown*, 100 Pa. 368 (1882); *South Chester Borough v. Stevenson*, 2 Del. 399 (Pa. 1885).

⁹⁸ The Borough Code provision is Act of May 4, 1927, P. L. 519, Art. XII, § 1202, Cl. XX; as amended July 10, 1947, P. L. 1621, § 40.

appear in building codes as well as in zoning codes, the problem should be briefly mentioned here.

The *Abridged Code* of the Building Officials Conference of America in section 101.0 defines "minimum habitable room size" as a room having a minimum dimension of 7 feet and a minimum area of 70 square feet. By "minimum dimension of 7 feet" the *Abridged Code* means that the length of the room, the width of the room, and the height of the room must each be at least 7 feet. But there is a definite distinction between the *Abridged Code's* provisions which define the minimum habitable size of a room and the provisions of ordinances which seek to prescribe the minimum area of the entire first floor of a dwelling without regard to number of rooms or number of occupants. There is little doubt that the *Abridged Code's* definition of a habitable room is a reasonable one; a minimum dimension of 7 feet is necessary to allow an average-sized person standing and reclining space. But a more difficult question is whether minimum first floor area requirements are reasonably related to a valid police power purpose.

The criteria by which the reasonableness of such a requirement may be judged remain the same whether it is included in a building code or in a zoning code. For a fuller discussion of the problem, see Section B of Chapter XIV, Part Two of this volume.

3. *Uniformity of Application*

The judicial requirement that municipal ordinances be uniform and nondiscriminatory in application is more often discussed with regard to zoning ordinances than building codes, but only because the districting problem in zoning ordinances raises the question more frequently. Building codes cannot without reason arbitrarily exempt certain structures or certain classes of people from their operation. The requirement of uniformity does not, of course, mean that all types of construction must be subject to the same requirements. But where the ordinance differentiates between classes of construction, there must be a real reason for the differentiation.

B. General Judicial Approach

Worthy of brief mention is the fact that the courts occasionally declare in general terms how building ordinances should be con-

strued by them. The drafters of Pittsburgh's building code apparently thought to take advantage of such statements when in section 104 of Pittsburgh's code they declared that it was intended to be "remedial." One Pennsylvania case⁹⁹ says that building ordinances, being remedial, ordinarily should be construed liberally to effect their purposes. On the other hand, some authorities both inside and outside Pennsylvania have said that because building codes are penal in nature, they should be construed narrowly.¹ The effect of these declarations one way or the other can largely be discounted.

On the other hand when courts are faced with a specific problem in construing a building code, they usually come up with a sensible and reasonable conclusion. In *Middletown Borough v. Bambach*² the court held that a building which had wooden walls sheathed with an incombustible material 3/16 of an inch thick still violated an ordinance which prohibited wooden walls.

A more difficult problem of interpretation was presented in *Commonwealth v. Walck*.³ The ordinance in question said that "in all dwelling houses the cellar shall extend under the whole building . . . and shall be ventilated. . . ." The appellant in the case had constructed a dwelling without any cellar at all, and the enforcement officials contended that this clause of the ordinance not only required a full cellar if any cellar were built, but further required that every dwelling have a cellar. The court found in favor of the appellant, saying that the ordinance did not by its terms require all dwellings to have cellars, that it really meant "in all dwelling houses the cellar (if any) shall extend under the whole building. . . ." The court added that the ordinance was being strictly construed because building ordinances are penal in nature, but the decision seems strong enough even without such a declaration.

In general then, municipal authorities, when they draft a building ordinance, need have little fear that their efforts will be misinterpreted by the courts. If a building code is phrased with a conscious effort to make clear the intent of the draftsmen, the courts will be willing to aid in the enforcement of that intent.

⁹⁹ *Beckershoff v. Bomba*, 112 Pa. Super. 294, 170 Atl. 449 (1934).

¹ *Berry v. Atlanta*, 43 S. E. 2d 191, 75 Ga. App. 278 (1947).

² 22 Dauph. 159, 48 C. C. 69 (Pa. 1919).

³ 9 D. & C. 373 (Pa. 1926).

C. Judicial Limitation of the Coverage of Building Codes; Retroactivity and Allied Problems

The word "penal," which the courts have sometimes used to describe building ordinances, has had its most meaningful force in one particular area. It is a legal commonplace that a legislative enactment which is penal in character and imposes a substantial penalty for its violation will be construed, if possible, so that it does not act retroactively. In addition to laws which are penal, this rule of construction is also applied to criminal statutes, to acts which interfere with vested rights in contract or property, to laws which are not "declaratory of the common law," and to ordinances which are not "explanatory of statutes."

As far as building codes are concerned, this rule is most often applied as a rule of construction; unless an ordinance unequivocally states otherwise, the courts will construe it to operate only as to buildings erected after the enactment of the ordinance. If the ordinance does unequivocally state that some of its provisions shall apply to buildings erected before the passage of the ordinance, such operation will sometimes not be allowed by the courts on the grounds of unconstitutionality and unreasonableness.

The first constitutional provision which is pertinent is Section 1, Article I of the Pennsylvania Constitution, which guarantees "certain inherent and inalienable rights, . . . those of enjoying and defending life and liberty, of acquiring, possessing and protecting property. . . ." The courts have said that these rights are, however, subject to reasonable regulation in exercise of the state's police power.

Also pertinent is the "substantive due process" aspect of the 14th Amendment to the Constitution of the United States. A state or local unit cannot "deprive any person of . . . property, without due process of law. . . ." Due process is not violated by police power regulations provided that the means of regulation employed is reasonable and appropriate for the attainment of their intended purpose. A building code provision which required previously existing buildings to conform to the exact specifications of the code where nonconformity is unlikely to result in danger to life, health, or morals would be unconstitutional under the 14th Amendment.

Certain other constitutional provisions are often cited by the courts as bearing upon the question, but chiefly by way of analogy. The prohibition of ex post facto laws in Article I, Section 17 of the Pennsylvania Constitution relates only to criminal proceedings and hence has no direct application to building codes.

The principle most often expressly applied by the courts is the familiar criterion of reasonableness; the judicial view is that a legislative body is being unreasonable if it penalizes an act or omission which was not unlawful when done unless the continuing effect of that previous act or omission is such that human safety, health, or morals is presently endangered.

Hence generally building codes must relate to buildings erected after their enactment. They may, of course, cover future acts which are done in connection with existing structures, such as repairs, alterations and additions.

Otherwise, however, they may require substantial changes in existing buildings only where there is a strong "police power" reason. They may impose requirements for the protection of the health and the lives of persons occupying existing buildings. They may require that previously-built buildings which are structurally unsafe be made safe or be subject to condemnation. Whether or not building codes may reach the more remote kinds of fire hazards in existing buildings is a question closer to the borderline; its determination will depend on the degree of the hazard sought to be remedied.

The future acts done in connection with existing buildings which may be covered by building codes fall into the following categories:

1. Reconstruction of destroyed existing buildings
2. Additions
3. Alterations
4. Major repairs
5. Change of use
6. Maintenance of existing buildings

1. Reconstruction of Destroyed Existing Buildings, Additions, Alterations and Repairs

There is little doubt that a building code can, even without an

express provision, require a permit for the erection of a building in place of a destroyed one which existed at the time the building code was passed. One Pennsylvania court has held that to tear down and rebuild an old wooden building, although part of the material of the old building is used in the construction of the new one, is a violation of an ordinance forbidding the erection of wooden buildings within certain limits.⁴

If the pre-existing building is only partially destroyed, many building codes expressly set a value limit to determine whether or nor the amount of reconstruction is sufficient to warrant a permit. Furthermore, if this value limit is exceeded, then in some places the building code is made to apply to the entire structure, both the old part which remains and the new part which is rebuilt. The code of KILBUCK Township⁵ provides that when existing buildings are destroyed to an extent greater than 50% of their value, the entire building thereafter must comply with the code. Pittsburgh's building code in section 109 requires the entire building to conform to the requirements for new buildings if major or structural alterations and repairs exceed 30% of the value.

The stating of a percentage is better than a very general statement. Too many of the ordinances in Allegheny County, like that of SHALER Township,⁶ merely state that "it shall be unlawful to construct, reconstruct or alter any building or equip any building . . . unless the same comply with . . . this ordinance."

Some municipalities have attempted to make the application of the code to repairs, replacements, and renewals a more flexible matter. MUNHALL's ordinance⁷ in section 1800 says that when a building partially destroyed by fire is being rebuilt, the "building supervisor shall determine in each case whether a permit is required." As the next chapter points out, where an ordinance gives an administrator discretionary powers, those powers should be circumscribed with some guiding standards both for the benefit of the administrator and for the benefit of a court which is consider-

⁴ *Morrow v. Lancaster*, 10 Lanc. Bar 193 (Pa. 1879).

⁵ Ordinance No. 6, July 19, 1949; Recorder of Deeds Book No. 1, p. 61.

⁶ Ordinance No. 240, March 3, 1931; Recorder of Deeds Book No. 2, p. 219.

⁷ Ordinance No. 517, October 21, 1930; Recorder of Deeds Book No. 3, p. 147.

ing whether or not the delegation to the administrator is an unlawfully general one. MUNHALL'S ordinance requires the building supervisor to pay "due consideration to the extent of the damage, and the character of the existing structure and the location of the building and of those surrounding it." Such guides are entirely too general and too nebulous. The setting of a value limit is a more desirable procedure.

The statement of a value limit should not be phrased merely in terms of "repairs" as a percentage of the "value of the existing building." The ordinance should state that "cost of repairs" is the factor. Furthermore, because there are many methods of evaluation of existing buildings, one particular method should be stated. The *Abridged Building Code* of the Building Officials Conference of America is clear on this point. Section 106.5 reads:

"... the physical value of the building shall be based on the estimated current replacement cost of the complete structure."

There is little doubt that building regulations may encompass additions, alterations, and repairs as well as reconstruction. Most codes exempt "minor repairs" but require a permit for major repairs such as replacement of a roof. These matters should also be clearly defined in the code itself. The burden of definition should not be placed upon the courts.

Any mention of the application of the building code to repairs, reconstruction, and alteration is, of course, better than no mention at all. A few codes in Allegheny County simply apply to buildings "hereafter erected."

2. *Change of Use or Occupancy*

A provision which is contained in very few of the codes in Allegheny County is one which would require previously built structures to comply with the building ordinance if their use is changed to another use which under the building code would not be permitted for that type of structure.

CLAIRTON'S code,⁸ the only one of the older codes in the county which contains such a provision, says in section 5:

⁸ Ordinance No. 171, March 5, 1926; Recorder of Deeds Book No. 1, p. 105.

"This code shall apply to all existing buildings, which are to be devoted to a new use for which the requirements of this code are in any way more stringent than the requirements covering the previous use of the building."

KILBUCK Township has a similar provision but requires only proportional compliance if the change of use is less than entire. Pittsburgh's code also provides for compliance in the event of change of occupancy.

The importance of a provision of this sort can most easily be seen with reference to floor loadings. If the building code is properly flexible, it will require a lower floor loading safety factor for office rooms, for instance, than for heavy storage; for example, the Building Officials' *Abridged Code* requires office floors to support a minimum of 50 pounds per square foot, but floors used for heavy storage must be able to support 250 pounds per square foot. Unless the safety margin for the lighter use is far in excess of that which is reasonable, to permit a change to the heavier use without requiring compliance with the code's specifications would be dangerous indeed.

The *Abridged Code's* provision for change of use is a well-phrased one. It reads:

"Section 106.2 CHANGE IN USE. If the use or occupancy of an existing building is changed to a use or occupancy which would be prohibited in a new building hereafter erected of similar construction and size, the entire building shall be made to conform to the requirements of this code for such new building; except that if the use or occupancy of only a portion or portions of an existing building is changed and such portion or portions are segregated by fire divisions as provided in section 119.2, then only such portions shall be made to comply with all the requirements of this code; or the building official may accept substitute solutions which insure an adequate degree of safety."

3. *Maintenance*

In Allegheny County the code of the City of Pittsburgh was the only one found which expressly dealt with maintenance of buildings as opposed to repairs.

4. *Unsafe Buildings*

The matters discussed above represent instances which may be encompassed in a building code because, even though the buildings involved may be ones which were constructed before the code was enacted, the acts regulated are ones performed after the passage of the ordinance.

In one area building codes may clearly apply lawfully to the previously existing buildings themselves. Where existing buildings not only fail to comply with the provisions of the building code but also are unsafe by general standards, then the building code may, as most in Allegheny County do, authorize the building official to serve an order upon the owner requiring him to make the building safe or take it down. A building which is unsafe, by reason of being a fire hazard or an unsanitary health hazard or structurally weak, amounts probably to what is legally defined as a nuisance, and where a nuisance is involved, the legal considerations forbidding retroactive operation of building codes do not apply.

5. *Buildings Which Are Moved*

About half of the building ordinances in Allegheny County are stated to apply to existing buildings which are moved within or into the municipality. For example FOREST HILLS, BEN AVON, and OAKMONT have provisions which so read.⁹ A few ordinances like that of CRAFTON,¹⁰ however, have no such section.

6. *House Trailers*

Closely related to the application of building code requirements to dwellings which are moved from place to place is the question of whether or not building code provisions can be imposed upon house trailers. The legal answer to this question has been settled by a decision of the Pennsylvania Superior Court, *Lower Merion Township v. Gallup*.¹¹ That case dealt with the building code of Lower Merion Township which in 1940 was amended by the addition of

⁹ Forest Hills Ordinance No. 13, April 18, 1921; Recorder of Deeds Book No. 1, p. 181. Ben Avon Ordinance No. 325, October 8, 1918; Recorder of Deeds Book No. 3, p. 41. Oakmont Ordinance No. 452, November 12, 1921; Recorder of Deeds Book No. 3, p. 554.

¹⁰ Ordinance No. 647, July 9, 1924; Recorder of Deeds Book No. 3, p. 410.

¹¹ 158 Pa. Super. 572 (1946).

a section which said "if a house trailer is used for living or sleeping purposes . . . for an aggregate of more than thirty days in any period of one year it shall be considered as a single family dwelling for all purposes of this ordinance." When the question reached the Superior Court that court decided that the application generally of a building code to house trailers was legal. The court said that the criterion of a thirty day occupancy was a fair standard by which to determine "whether the use is temporary and transient . . . or settled and fixed" and therefore subject to the building code restrictions. The chief ground on which such general applications of building codes to house trailers may be attacked is that, without complete reconstruction, virtually no house trailers can conform to the provisions of a code originally drafted with only conventional buildings in mind. However the Superior Court based its decision chiefly upon the fact that house trailers, although they are structurally different from conventional buildings, are undeniably intended to be used as dwelling houses when they are fixed in one place for any substantial period.

The effect of this decision is that a municipality may completely bar the permanent location of house trailers within its limits by a section such as that which Lower Merion Township used which imposes conventional building construction requirements wholesale upon house trailers. If a municipality in express terms entirely barred house trailers from its limits such an ordinance could be attacked upon the grounds of unreasonableness; only a strong showing that house trailers are detrimental to health, welfare or morals when used as relatively permanent dwellings could support the validity of such a requirement.

If municipal officials do not wish to bar entirely the use of house trailers as permanent or semi-permanent dwellings they should classify house trailers as a special group of structures and prescribe suitable construction requirements for the class rather than regulate house trailer dwellings by construction provisions which were originally intended only to embrace the construction of ordinary fixed dwellings.

In other respects the same rules which apply to regulation of fixed dwelling houses will also apply to the enforcement of restrictions imposed upon house trailers. An illustrative case is *Common-*

wealth v. Briggs.¹² That case involved the building code of the township of Darby which in 1948 was amended to include a provision very much like that adopted by Lower Merion Township, a section stating that a house trailer which has been occupied within the township for more than thirty days in any year shall be considered a dwelling house for all purposes of the building code. Although the amendment was upheld as valid, the Court of Quarter Sessions of Delaware County refused to permit Darby Township officials to enforce it against the defendant who had fixed the location of his house trailer within the township and had occupied it for more than two months prior to the date the amendment to the building code was enacted. Relying heavily upon the fact that in fixing the location of the trailer, sewerage the lot and performing other construction, the defendant had made a total outlay of about \$8000, the Quarter Sessions Court set the conviction aside on the ground that the ordinance could not be applied retroactively to impair the rights which the defendant had acquired in a substantial investment.

7. *Uncompleted Buildings*

One problem which has not arisen to plague building officials in Allegheny County and has apparently not been anticipated by them is that of buildings which their owners begin but fail to complete. It is a rare problem in times of housing shortages, but it was posed by Mr. Everett N. Glenn, City Attorney of Sacramento, California, at the 1947 Conference of Municipal Law Officers. Mr. Glenn's city issued a permit, but when the building was half finished, the owner ceased construction. A legal basis on which a building code could require such work to be finished would be hard to find. As Miss Anne Alpern, Pittsburgh's City Solicitor, answered Mr. Glenn's query, the half-finished structure could be condemned if there was anything about it unsafe enough to warrant condemnation, but if that part of the structure which is completed is safe and is maintained, then there is no basis on which to require it to be abated. If the building is not actually dangerous, the chief consideration would seem to be an aesthetic one. But the courts have long stated that aesthetics cannot be the sole basis for a building or zoning law.

¹² 72 D. & C. 437 (Pa. 1949).

CHAPTER VII

ADMINISTRATORS AND ADMINISTRATIVE PROCEDURE

Introductory Note:

A comprehensive and beneficial program of regulation of housing construction has only begun when a valid, modern and adequate ordinance has been enacted. The quality of housing will be affected not at all if the ordinance lies fallow, if it is not translated into practice by an administrative program which follows adequate procedural methods and is managed by a competent administrative staff. This chapter looks at the general pattern of administrative methods which exist in Allegheny County today and examines in particular one aspect of it. It also examines the provisions which have been made for obtaining able personnel and suggests possibly better solutions to the personnel problem.

Then upon the assumption that an efficient procedure has been provided and that competent personnel are available to operate within that procedure, this chapter examines the more distinctively legal problems which surround administrative discretion.

A. Procedure and Personnel

The implementation of a building ordinance may be divided abstractly into the two elements of procedure and personnel; however, these abstractions in practice are so interrelated and interdependent that they cannot realistically be examined separately. For that reason they are discussed jointly here.

1. *Pattern of Administrative Methods in Allegheny County*

The standard administrative method employs a building inspector or, in larger cities, a bureau of building inspection whose functions principally are those of approval or disapproval of existing or proposed construction. Other functions equally as important are those of detailing the program through rule-making and keeping the provisions of the building code itself up to date.

Permits: Virtually all municipalities which have a building code provide for the issuance of a building permit upon approval of the plans and specifications which the builder is required to sub-

mit.¹³ Virtually all municipalities also provide for inspections of the construction during its progress, but not so many local governments provide for the issuance of a second permit, an occupancy permit, when the building is completed.

In Allegheny County the pattern conforms to this general one. According to Element IX of Table E (page 15) the most common administrative method involves building permits issued by the building inspector. About 74% of the ordinances analyzed provide for this procedure. A small minority of the codes analyzed make the additional provision for an occupancy permit; these ordinances constitute 21% of the total. Fortunately, only two of the ordinances examined make no express provision for a building inspector. No ordinances omit mention of a building permit.

The larger municipalities invariably provide for a full-time building inspector, and the codes of DUQUESNE,¹⁴ and McKEESPORT,¹⁵ as well as six more, in addition make provision for the issuance of an occupancy permit.

All building regulation programs should provide for the occupancy permit procedure in addition to the initial building permit. Although inspection of plans when submitted is a necessary step, the building administrator must follow through by inspecting the work in progress and when completed. A final approval upon completion of the work should be evidenced by an occupancy permit which serves to assure the builder that his work conforms sufficiently well to the code so that he will not be subjected to penalty.

Participation of Councils and Borough Secretaries: In the Allegheny County pattern the ministerial functions of council are often in evidence. In FOREST HILLS¹⁶ and NORTH VER-

¹³ At the time this report was being prepared for publication, several bills had been introduced into the 1951 session of the Pennsylvania legislature which would require local municipal officials to keep records of building permits issued. These records would indicate the location of the property and the nature of improvements made. Once a month such records would be forwarded to the county tax assessors, so that the tax assessors could be informed of the existence of improvements increasing real property valuations for tax purposes. These bills were Senate Bills 709 and 710 and House Bills 245 and 655.

¹⁴ Ordinance No. 217, June 22, 1925; Recorder of Deeds Book No. 1, p. 146.

¹⁵ Ordinance No. 813, December 28, 1925.

¹⁶ Ordinance No. 13, April 8, 1921; Recorder of Deeds Book No. 1, p. 181.

SAILLES,¹⁷ according to their ordinances, the building program is nominally administered by council, although the borough clerk is designated as the person who actually issues the permit. Additionally, in FOREST HILLS, by section 6 of the original ordinance, the council may employ a commission of experts to examine plans and transmit their approval or disapproval to council. The administrative pattern of this borough is further complicated, because in section 9 council is to appoint a building committee consisting of three members of council who routinely are the ones to examine and approve or disapprove plans. By section 4 the burgess must approve the permit after council grants it. Such a many-layered system, in which the council, its building committee, the burgess, and the borough clerk are all used and with which a specially-appointed building commission may be used, might produce more confusion than efficiency.

CRAFTON Borough¹⁸ uses a variation of this system. There the borough clerk issues permits upon the approval of the building inspector, and council acts only on appeals from the decisions of the building inspector. As in FOREST HILLS, the council may employ a commission of three experts, where a "building of complex character" is involved. SCOTT Township¹⁹ also provides for an expert commission in such cases.

The former ordinance of the borough of EDGEWORTH,²⁰ in section 14 provided that buildings with outside walls of wood or other inflammable material cannot be erected unless application is made to council which may grant a permit circumscribed by "unusual and special conditions."

In actual practice in many small municipalities the function of the borough clerk has often grown to be more than the mere ministerial one of issuing the permit. At least where there is no provision for a building inspector at all, the entire administration of the building program tends to gravitate from council, a part-time

¹⁷ Ordinance No. 188, May 10, 1943; Recorder of Deeds Book No. 3, p. 574.

¹⁸ Ordinance No. 647, July 9, 1924; Recorder of Deeds Book No. 3, p. 410.

¹⁹ Ordinance No. 234, August 12, 1941; Recorder of Deeds Book No. 1, p. 276.

²⁰ Ordinance No. 183, August 13, 1928; Recorder of Deeds Book No. 3, p. 128.
Now repealed.

body, to the borough clerk or manager who is often employed full time. Whether the actual work of approval of plans is done by council, a committee of council, the borough clerk, or the burgess, the absence of requirements in the ordinance that these functionaries be experts in the field of construction makes an efficient administration very unlikely.

2. *Personnel Problems; Devices to Improve Efficiency*

Of course, the central reason why an expert is not always employed is that experts are not always available. And even if a municipality is fortunate enough to discover an alert and competent architect, engineer or contractor, he will most often be employed part time. A small municipality cannot be expected to stretch its budget in order to provide a sinecure where the volume of work does not warrant a full-time staff. Many of the smaller municipalities in Allegheny County do not pay a salary anyway; they provide that the building inspector's compensation shall be the fees which he collects.

Ideally, a building inspector's compensation should not be dependent upon fees, because even as a part-time income they do not provide a sufficiently stable payment as an incentive to a well-qualified man. It is preferable that the building inspector be paid a salary and that the fees go into the general fund. The *Abridged Code* of the Building Officials Conference of America suggests, in a note to section 104.0, that a "building code fund" might be established with the fees received. However, the additional work required to administer a separate fund lessens the advisability of such a procedure.

In the face of a small volume of work and small budgets which do not permit each municipality to employ a full-time building official, this report suggests an informal solution. Groups of municipalities located close together could arrange to employ jointly, at a salary, a common building inspector for the area, to serve on a basis approaching full-time work. Such a solution would work especially well should the participating municipalities all adopt the same uniform model building code.

Whether municipalities employ building inspectors jointly or not,

there are other procedures, which may be employed to better the administration of the building code. The *Abridged Building Code* suggests a novel one as follows:

"Section 104.7 CONTROLLED MATERIAL PROCEDURE AND APPROVAL. When plans for the erection or alteration of a building are prepared by a professional engineer or registered architect, licensed under the laws of ——— and such plans and specifications are accompanied by an affidavit by the applicant that he has supervised the preparation of all the design plans and that he will supervise or check all working drawings and shop details for the construction; and that the structure will be built under his field supervision and in accordance with the approved plans, and that such plans conform to all the provisions of the Basic Code and that all the materials used in the construction will be selected by him in accordance with the Controlled Materials Procedure therein defined, the building official may issue a permit for the erection of the building. The building official shall make such inspections as he may deem essential to secure compliance with the building code.

"Before such building or structure is permitted to be used or occupied, the licensed professional engineer or registered architect who prepared and filed the original plans and who supervised the erection of the building shall file an affidavit stating under oath that the provisions of this code have been fully complied with and that the building meets all the requirements of law for the proposed use and occupancy. . . ."

If such a procedure were operative, it would tend to make the administration of a building program more efficient. Although the use of an affidavit is voluntary, if the engineer or architect does submit one, he then, under penalty of perjury, in effect does part of the building inspector's job. This procedure would to some extent eliminate a duplicate detailed examination of the plans by the building inspector, because the licensed builder certifies that *he* has examined them in detail. Spot checks by the building inspector would be sufficient.

Furthermore, in some instances the builder will actually be more expert in construction matters than the official inspector himself; thus an element of additional expertise would be introduced into the administration.

Of course, the greatest question is whether builders will volunteer such affidavits as the section of the model code describes. At first glance it would seem that most builders would be unwilling to chance incurring a penalty for perjury. Yet on the other hand there are instances where a builder might definitely find his own interests best served by the use of this volunteer procedure. As Mr. John Bailey of EDGEWORTH points out, the time saved by eliminating a long duplicate examination of the plans by the building inspector may provide an incentive. Some ordinances in the county today allow the building inspector 15 days for his examination of the plans, a time which is not unreasonably long if the building inspector has to begin his examination from scratch. However, an ordinance might require (as the *Abridged Code* does not) that the building inspector approve or disapprove plans which are accompanied by an affidavit in a much shorter time. If the builder could be assured that submission of an affidavit would enable him to begin work more promptly, a desire to take advantage of favorable weather conditions or similar factors might prove to be a sufficient incentive for him. Another factor which might urge the professional builder to submit an affidavit is the builder's customer who, if he were aware of the procedure and if he were in a hurry, might demand that the builder whom he employs submit such an affidavit.

Still other devices are available which may be employed to increase the efficiency of the administration. A common provision is that the building inspector may employ technical advice when especially difficult problems arise. This is a provision fairly common in Allegheny County; the ordinance of KILBUCK Township²¹ contains an example.

Also important are the provisions which specify the qualifications of the building inspector. GLASSPORT Borough²² in section 3 requires that the building inspector must be a person with 10 or more years experience as a general contractor. Similarly, CLAIRTON²³ states that the building inspector shall be a competent

²¹ Ordinance No. 6, July 19, 1949; Recorder of Deeds Book No. 1, p. 61.

²² Ordinance No. 313, June 20, 1929.

²³ Ordinance No. 171, March 5, 1926; Recorder of Deeds Book No. 1, p. 105.

architect or engineer or builder with 10 years' practical experience and further requires that he not engage in other business while in office. Phrased in more general terms is the provision in OAK-MONT'S ordinance²⁴ which simply states that the building inspector shall be "practical and experienced" in the erection and construction of buildings.

To require efficiency from the building inspector under penalty seems a fruitless procedure. For example, BEN AVON'S ordinance²⁵ states that after a builder asks the building inspector to make an inspection, if the building inspector fails to inspect within 36 hours, he shall forfeit \$5 for every day of such failure. It is very unlikely that this sort of provision will actually be enforced by municipal officials against their own appointee.

Another device for obtaining more efficient administration and one which may permit a middle-sized municipality to employ a full-time inspector is that of consolidation of all inspection functions relating to housing in one office. Very commonly today the building inspector administers the zoning code as well as the building code and also the plumbing code, if any.

However it is difficult and unwise to delegate to one man duties of such a widely different nature that he could not be expected to be expert in all of them. For example, a man with the training necessary to qualify him as a building inspector may well be a good choice to administer the building, zoning, and plumbing laws, and yet be unqualified to serve also as health inspector.

The *Abridged Building Code* takes a different approach to the matter, an approach which is also of dubious value, however. Section 104.9 of the code reads:

"COORDINATED INSPECTION. All provisions of the laws and regulations of the state and of legally adopted rules of local fire, health and labor officials in respect to the operation, equipment, housekeeping, fire protection, handling and storage of inflammable materials, liquids and gases and the maintenance of safe and sanitary condition of use and occupancy in all buildings shall be strictly enforced by the administrative officials to whom such authority is delegated. Whenever

²⁴ Ordinance No. 452, November 12, 1921; Recorder of Deeds Book No. 3, p. 554.

²⁵ Ordinance No. 325, October 8, 1918; Recorder of Deeds Book No. 3, p. 41.

inspection by any authorized enforcement officer discloses any violation of the provisions of this code or of any other rules, regulations or laws, he shall immediately notify the administrative officer having jurisdiction of the violation."

The first sentence of this section is of doubtful worth except as an enumeration of the various aspects of regulation which can be coordinated. The general idea of this section, however, is salutary enough; the second sentence is an injunction to all inspection officers to assist each other in their work insofar as they are able.

3. *Complaint Procedure*

Although a building code may provide for adequate official inspection in the case of construction of new buildings, the administrative staff must rely heavily upon the citizens themselves for complaints which reveal the existence of unsafe or unsuitable buildings.

Several codes in Allegheny County require that, when a building is being erected, "notice be given of the application for the permit to any person or persons whose property interests may be affected by the proposed work." This is a provision in section 17 of BEN AVON'S code. Section 18 of that code goes on to state that "any person, the value of whose property may be affected by work done," may within three days after the permit is issued appeal to council to have the permit revoked. FOREST HILLS' ordinance²⁶ has similar provisions, as does NORTH VERSAILLES.²⁷ In these provisions, the criterion upon which council's revocation of a permit depends, the effect of the construction on the value of nearby property, is one of dubious legality at best.

More important are the provisions which building ordinances make for complaints about unsafe buildings. Such complaints should be freely received. However, several Allegheny County building codes provide, as BEN AVON does in section 13, that when a complaint is made to the building inspector that a building is unsafe, the inspection fee of \$5 must be paid by the complainants. A like provision is contained in the ordinances of OAKMONT and

²⁶ §§ 13, 14.

²⁷ §§ 12, 13.

BRADDOCK HILLS.²⁸ A more effective way of preventing complaints could hardly be devised. Apparently the reason for requiring the complainants to pay the fee is to keep down unfounded complaints. However, this sort of provision is akin to requiring that a fee be paid before a fire alarm is turned in. Even if a few unfounded complaints are received, the time required to inspect a building in order to determine if it is unsafe ordinarily would not be as long as the time required to determine whether or not a new building conforms with all provisions of the building code. Often a cursory inspection would be sufficient to show whether or not a complaint is unfounded, and therefore not much time would be wasted on unfounded complaints. Of course, this sort of provision is also a concomitant of the fee system of compensating building inspectors. Unsafe buildings could be detected more easily if the municipality itself assumed the cost of inspections made on complaint.

B. Administrative Discretion and Rule-Making Powers

In addition to the routine duties of issuing permits and making inspections, building inspectors are often granted broader functions. Already discussed has been the advisability of granting the building official the power to incorporate in rules current standards against which materials and methods may be measured as a part of the administration of a performance code. More common are ordinances which grant the building official discretionary powers with reference to particular aspects of construction, or the power to make interpretations of the express provisions of the code.

The practicability of allowing an administrator to interpret difficult provisions of a building code and requiring him to incorporate those interpretations in rules is evident. Actually, building officials find themselves doing just this all the time whether they are expressly required to do so or not. When a person intending to build encounters a provision in the code which he does not understand, the first person he asks for an explanation is the building inspector himself. The requirement that the official preserve his interpretations in permanent form is merely a method by which his explana-

²⁸ Ordinance No. 7, May 4, 1926, § 14; Recorder of Deeds Book No. 2, p. 265.

tions may be made more readily available to the public and more uniform.

This section of this report deals with those other powers of a building inspector which involve the exercise of value judgments, a function more complicated than mere interpretation. Because it is difficult for even a well-drafted building code to cover all situations, the exercise of some discretion by the building official is necessary. The problems here are to insure that his rule-making and discretionary powers will be exercised in conformity with general constitutional requirements and in conformity with the building ordinance itself and not in spite of it.

1. *Constitutionality and Legality of Discretionary Powers*

The Rules of Law: The courts in Pennsylvania have several times been called upon to decide the legality of discretionary powers given building officials. When a building official attempts to exercise a discretion of his own in the absence of any provision in the ordinance granting it to him, his action is ordinarily invalid. In *Coyne v. Pritchard*²⁹ the supreme court said that a building inspector could not refuse to issue a building permit for a garage on the ground that the location had been disapproved for that use by the board of city planning. The justification for this part of the court's decision was very clear, because the facts showed that the board of city planning had not as yet made its final report, and there had been no hearing before council in regard to the planning board's determinations, as a statute required. Additionally, the court in that case said that the fact that the garage would be in a residential neighborhood and that it might be a nuisance was no ground for denial of the building permit. The court said that the building inspector's duty to issue the permit was merely ministerial and that questions as to the legality of the use were beyond the scope of his duties and must await proper proceedings for their determination. The fact that the permit might have been useless to the applicant was held no reason for refusing it.

The building inspector's discretionary powers, if any, must be defined by ordinance. Where council or a committee of council is

²⁹ 272 Pa. 424, 116 Atl. 315 (1922).

acting ministerially as the administrators of the building regulation, the discretion of council itself is also limited. In *Wright v. France*³⁰ the court held that a council could not refuse to issue a permit on the ground that the proposed building was "entirely out of keeping with the residential character" of the community.

The courts have made plain that the exercise of discretion cannot be arbitrary or based on collateral matters. A lower court case has held that a building permit could not be denied a builder because another person intended to put the building to an improper use after it was erected. The court said that the discretion of a building inspector must be legal and cannot be unlimited; when the plans comply with requirements, the building inspector cannot refuse a permit.

The courts often speak of unlimited discretion as being a "wrongful delegation of legislative power." To insure that no lawmaking power is delegated to an administrative official such as a building inspector, judges demand that the discretion be circumscribed with standards of conduct. These standards are intended to serve as guides by which the official may measure the extent of his freedom of judgment; in addition, they serve as guides by which the court itself on review can determine whether or not the power of the official exceeds that which is lawful.

The decision which an official makes when he decides whether or not a proposed construction conforms to the requirements of the building code is the simplest and clearest example of a decision made by him but controlled by standards set forth by the legislative body. In a case which did not deal with a building code but which involved the related matter of plumbing inspection, the Superior Court of Pennsylvania has said that the power of a plumbing inspector to confer or withhold approval stickers did not involve a wrongful delegation.³¹ The court said that the constitutional prohibition against delegation of legislative power to administrative officials, which is implied in article II, section 1 of the Pennsylvania Constitution,³² "is not violated by committing certain legislation

³⁰ 279 Pa. 22, 123 Atl. 586 (1924).

³¹ *City of Scranton v. Hollenberg*, 152 Pa. Super. 138, 31 A. 2d 437 (1943).

³² The constitutional provision to which the Pennsylvania courts refer reads:

relating to municipal affairs to the legislative branch of a municipality, nor by the latter committing to trained and experienced agents the determination of facts necessary to enforce or carry into effect an ordinance which it has enacted and which sets forth the purpose and scope of its action."

To be exact, in the case of discretionary powers of local administrative officials, the unlawfulness, if any, lies in a redelegation of legislative power to the administrative official by the local legislative body to which the power has been delegated in the first instance by the state legislature.

Prohibition against delegation or redelegation of legislative power has a long history. Some authorities believe that it originally sprang from the legal maxim which prevents an agent from redelegating duties which his principal has entrusted to him. By analogy this maxim was applied to public law on the assumption that the people constituted the principal who originally delegated lawmaking power to the legislature as agent and that hence the legislature could not in turn pass on any of that lawmaking power to state *administrative* agencies. It is clear, however, that the state legislature may vest lawmaking power in the local legislative bodies. They in turn, however, are forbidden from redelegating any of that power to local administrative officials.

There is another ground upon which delegations of lawmaking powers may be forbidden. As previously pointed out in this report, the statutes which enable local units to regulate building expressly state that that power shall be exercised by the *enactment of ordinances*. Thus everything in the building regulation program which is legislative in nature must be defined in the ordinance itself and not left to the will of the administrator.

Analysis of the Rules: Two interrelated difficulties are at the core of this problem. First, how can a lawmaking power be distinguished from an administrative power? The answer which the Pennsylvania courts have most frequently given is that a power to determine merely the facts upon which the action of the law depends is an administrative power. To define such a power the

"The legislative power of this Commonwealth shall be vested in a General Assembly which shall consist of a Senate and House of Representatives."

legislative body must state standards for the determination of the facts, so that the administrator theoretically need only follow these standards to arrive at the fact, then look at the law to see what action the legislative body desires be taken when such facts are present. The second problem which arises, then, is how to formulate standards for the guidance of the administrator in arriving at so-called facts.

The Pennsylvania cases do not supply much help in deciding what guides are adequate and what guides are inadequate. In *Kellerman v. Philadelphia*³³ the Superior Court held invalid a regulation of hours of business for barber shops which prescribed certain hours and, in addition, allowed the director of public health to issue a permit for operation at other hours if in the "opinion" of the director "public necessity" required it. The court said that the criterion of "public necessity" was not a sufficiently clear guide for the "opinion" of the director. Similar regulation has also been held invalid by the supreme court.³⁴

Where the subject matter of the regulation is more technical than business hours of barber shops, there are usually scientific standards available for the determination of facts.

The subsidiary problem in these more technical matters is whether the legislative body must state the scientific standard in detail or whether it may by the use of general terms simply *refer* the administrator to a body of knowledge within his own field. The nature of such a distinction is made plain in a study of building codes because it is analogous to the distinction between specification and performance codes. In the specification code, the legislative body states the scientific measures in inflexible detail; in the performance code, the legislative body states the results desired as accurately as possible but refers builders and the building code administrator to external scientific standards. As previously pointed out in this report, the use of the detailed specification code may become scientifically inaccurate through obsolescence, while the performance code, if well drafted at the outset, will remain accurate for a long time because under it the scientific details

³³ 139 Pa. Super. 569, 13 A. 2d 84 (1939).

³⁴ *Saccone v. Scranton*, 341 Pa. 529, 20 A. 2d 236 (1941).

may be changed when new ones become available. To be exact, some discretion is granted the administrator by every performance-type provision, but these grants are not challengeable as unlawful delegations because they can ordinarily be linked to particular authoritative sources.

Even in a performance code, however, there is a need for occasional grants in even broader terms; these are the ones which concern us in this section. For example, there is no single body of rules which an administrator may follow to determine if a building is "unsafe"; the complete building code itself may be the closest approach to such a source. But the building code is designed to contain rules applicable to all kinds of buildings. It is drafted so that if *any building*, regardless of its particular type, complies with *all* its rules, then safety is assured. Yet a *particular building* may fail to comply with certain combinations of the building code's provisions and nevertheless still be safe. Because of the drastic steps which are taken against unsafe buildings, mere non-compliance with one or two random provisions of the building code cannot be taken as a certain proof that the particular building is unsafe. Thus the dilemma is presented; to determine whether or not a building is "unsafe," the administrator cannot turn to one book for the answer; to the exact scientific measures he must add his own experience and expertise to decide if the particular construction confronting him falls short of meeting such a *combination* of scientific measures that that resultant is a lack of safety.

The paradox is plain. In a field replete with exact means of measurement, in some instances the ordinance cannot point to a named source of information, and the courts forbid leaving the matter entirely up to the private capabilities of the administrator. The solution allowed by the courts, theoretically, is that the legislative body may set the end-limits beyond which the administrator shall not go; within those limits he may be free to apply his personal aptitudes to deciding what relative weight should be given to the various exact scientific measures available to him.

At least, as between matters susceptible to scientific measures and those which are not, we can see that the problem of setting the end-limits is much easier where the subject matter is technical,

provided the legislative body need not state the scientific standards in detail but need only by general terms refer the administrator to them.

Because the courts are aware of the dilemma outlined here, they usually will uphold an honest effort to solve the problem. For example, Pittsburgh's building code, although it gives the administrative staff the power to condemn buildings which are simply "unsafe," is probably on firm legal ground because in another section it enumerates a long series of national authorities as guides. The Pittsburgh building inspectors may use their own expertise to decide whether or not a building is unsafe, but the scientific basis of their decision is limited to the authorities enumerated.

Under some conditions, the courts will permit limits which are implied rather than stated. Previously mentioned in this report has been the amendment which was added to many building codes in the state during World War II. This amendment ordinarily authorized building inspection staffs to approve temporary substitutions for materials required by the ordinance which were unavailable because of wartime conditions. The courts have said that this sort of an amendment was not an unlawful grant of power.³⁵

Conclusion: Thus we see that in practice the lawfulness or unlawfulness of any particular grant of discretion will depend upon the circumstances surrounding the situation. In general we know that lawmaking power cannot be committed to an administrator but that he may be given the power to determine whether or not a certain fact exists. We further know that the formulation of guides defining for the administrator's benefit the nature of the fact to be found is a difficult problem. Yet the legislative body will probably find the devising of legally adequate guides easier where the subject matter is as technical as that of a building code. Because exact *external* standards are available to serve as a basis for administrative discretion, the *internal* standards stated in the law need not be detailed but need only refer to the external standards with a reasonable amount of precision. As the court stated in *Scranton v. Hollenberg* at page 144, "too narrow a construction of such matters would be simply intolerable. The whole system of

³⁵ *Commonwealth v. Campbell*, 29 Erie 113 (Pa. 1946).

health regulations, quarantine, inspection, licensing . . . is based on the action of experienced and skilled persons who perform the duties assigned them pursuant to the broad general aims and purposes declared by the legislative body.”

In the final analysis, the accuracy of particular factual determinations made by an administrator will depend upon his own experience and training; for him, the guides need to be only definite enough to mark out the general limits of his action. Similarly, in order to stand up under the scrutiny of a court, the guides need only be enough to enable the court, as a body of non-experts, to see that the administrator's field of action is limited in some wise.

The device of enumerating a list of authorities among which the administrator may choose, as Pittsburgh's code does, is the one most likely to find approval with the courts.³⁶ Most performance codes contain such an enumeration.

2. *Discretion in the Administration of Allegheny County Building Codes*

Varied types of discretionary powers are contained in existing building codes in Allegheny County. They are summarized in Element X of Table E (page 16). About six sections were found in as many ordinances which confer very broad powers to amend and modify the building code. The outstanding example is the building code of CLAIRTON. Section 11(d) of the CLAIRTON ordinance gives the building inspector the authority to make rules covering details or materials not otherwise provided for; in the same section he is empowered to “pass on questions relative to” the manner of construction or materials to be used, requiring that they conform to the “true intent and meaning” of the code and to “good engineering design and practice.” This section in effect probably confers only the power of interpretation together with the power to incorporate currently approved materials and methods in rules. This same section of the code lists national authorities

³⁶ For examples of Pennsylvania cases which illustrate the favor with which the courts have viewed this approach, and for a discussion of the allied problems of delegation at the state level, see Craig, *Delegation of Power to Administrative Agencies in Pennsylvania*, 11 UNIVERSITY OF PITTSBURGH LAW REVIEW 73 (1949).

to be consulted in the promulgation of special requirements of details or materials.

The building code of Pittsburgh reposes discretionary powers in a board of standards and appeals by a section which reads:

“Section 305 (a): For the purpose of determining questions of fact as to the adequacy of methods of construction, materials, or equipment and to provide for factual interpretation of the provisions of this code there is hereby created a board of standards and appeals. . . .”

Note that this section describes the duties of the board as relating to “questions of fact” and “factual interpretation”; apparently it was drafted with a concern for the judicial distinctions between lawmaking and fact finding. The promulgation of rules by the board of standards and appeals detailing the performance requirements of Pittsburgh’s code under this section would not amount to an unlawful delegation of legislative power, because the provisions of the performance code itself serve as guides for the administrative staff.

Some Allegheny County ordinances contain discretionary powers formulated so that the administrative staff may allow a variance from the exact provisions of the code when the construction of a *particular* building is such that it still substantially meets general requirements of safety. This discretionary power is distinctly different from a power “to amend or modify” the code. The code of WEST MIFFLIN Borough^{36a} contains a provision which says:

“Section 2401: Where the circumstances or conditions of any particular construction are unusual and such as to render the strict application of the building code impracticable, the building committee of the borough council may permit such modifications of the building code as in their opinion would provide a substantially equivalent degree of safety.”

Pittsburgh’s code has a similar provision. According to section 305(d) the board of standards and appeals may allow a variance “if the building will vary only a reasonable minimum from the . . . code, but will comply with the spirit and intent of the code with

^{36a} Ordinance No. 80, October 4, 1949; Recorder of Deeds Book No. 3, p. 182.

respect to hazard from fire and safety to life, limb, and property. . . .”

In both these instances the standards by which the granting of variances is to be guided are general in nature. But these are not instances of grants of rule-making power; they are rather the grant of discretionary powers to be exercised in occasional particular situations. Thus by their nature they are one step further removed from the area of lawmaking, and the loose standards in general terms would probably suffice. These are provisions designed to cover situations which rules could not cover, instances which the local legislative body was not able to foresee when it drafted the code, and hence the courts are more likely to hold that they do not represent matters exclusively within the powers of the legislative body.

Fifty-eight per cent of the ordinances analyzed in Table E contain occasional lesser examples of administrative discretion. One sample is contained in SEWICKLEY'S ordinance,³⁷ which in section 3(c) gives the building inspector the power to withhold the permit required for moving a building if placing the building in its new location would create a fire hazard. Another instance of this narrow sort of discretionary power is displayed in section 1800 of MUNHALL'S code, which states that when a building is partly destroyed, the building supervisor shall determine whether the owner need get a permit for the work of repairing. Other provisions in MUNHALL'S code, also contained in the codes of DUQUESNE and McKEESPORT, are section 913, previously mentioned in this report, which empowers the building inspector to use his judgment in determining whether lime mortar may be substituted for cement lime mortar in the construction of walls, and section 916, which permits the building supervisor and street commissioner to impose requirements for vault construction in addition to those expressly imposed. More common are provisions like section 6 of SHALER Township's Code³⁸ which confer upon the building inspector the power to determine whether or not an existing building is unsafe.

³⁷ Ordinance No. 472, July 5, 1916.

³⁸ Ordinance No. 240, March 3, 1931; Recorder of Deeds Book No. 2, p. 219.

These instances of particular discretionary powers of building inspectors are very common. Because they are seldom litigated, it is difficult to predict whether or not all these matters constitute lawful grants of power. It is safe to say that they are more likely to be upheld than not.

However, when Allegheny County municipalities set about to acquire new codes, to be safe they should make the standards which guide administrative discretion as precise and exact as possible. In addition to their value in safeguarding the legality of grants of discretionary powers, the use of precise statements of the scope of discretion are administratively helpful in that an administrator may point to them as specific support for particular decisions made by him.

CHAPTER VIII

ENFORCEMENT; PENALTIES AND REMEDIES FOR VIOLATIONS

A. The Enforcement Pattern in Allegheny County

1. *Analytical Summary*

Element XI of Table E (page 16) summarizes the types of enforcement provisions contained in Allegheny County building codes. That table is largely self-explanatory. It shows that most commonly the ordinances provide for monetary fine with imprisonment for failure to pay the fine; furthermore they state that the fine shall be recoverable by summary proceedings before a burgess or justice of the peace.

Only a few ordinances have sections which attempt to state the fullest enforcement powers; there were five such sections in the ordinances of the 38 outlying municipalities which were analyzed. In addition to providing for fines or imprisonment, these ordinances also state that buildings or parts of buildings which do not conform to the provisions of the code must be abated, and they also provide that if the municipality itself conducts the abatement, it may recover the cost through a lien. These broad sections also declare that nonconforming buildings are a "nuisance," such declaration presumably being the basis for the power of abatement. Whether or not such declarations are wholly effective from a legal standpoint will be discussed in Section C of this chapter.

2. *Informal Enforcement*

During the course of this study, intensive on-the-spot investigations of the actual pattern of enforcement in Allegheny County could not be conducted. However, so far as was possible solicitors and municipal officials were asked about the enforcement problems which they had encountered. One of the questions asked was whether they had found it necessary recently to take violators before a magistrate in order to command obedience to the building code. In virtually all municipalities outside Pittsburgh the officials could not remember any need for legal action during the past year

or so at least. They pointed out that home owners and builders complied with the orders of the building inspector or the council willingly.

These reports suggest that the enforcement picture in the small outlying municipalities other than Pittsburgh involves other factors besides legal process. In the smaller local units the builders and home owners are likely to be personally acquainted with the municipal officials. When the enforcement officer and the violator are known to each other, especially if the violation is an innocent one, a friendly warning is apparently sufficient in most cases to induce compliance. Thus we see that at the local level, at which building code enforcement operates, the problem of remedying violations is vastly different from that which appears in the case of matters which are more centralized in their administration—matters enforced at the state or federal level. When a law covers a large area, the personal and human factors are much more likely to be absent, and the enforcement pattern is more likely to correspond to the outlines of the written law. At the local level the exact legal architecture is less significant, perhaps because less often needed.

One example will suffice. The knottiest legal problem in the enforcement of building codes is the extent of the power of abatement, the power to compel an owner to take positive steps to make his structure conform to the requirements of the building code, or in the event of his failure to do so, the power of the municipal officials themselves to remedy the condition and charge the cost to the recalcitrant owner or builder. As the discussion in Section C of this chapter shows, the legal ramifications of this problem are many; the ordinance provisions dealing with these matters, of course, should be clarified and should be made to conform to the statutory and judicial rules which control them, because the legal abatement process will have to be employed on some occasions even in the small municipalities. However, in most cases conformity is compelled by simple and informal steps. One solicitor reported to the Project that a person in his municipality had constructed a building whose walls did not conform to the requirements of the building code. When asked what sort of action was taken, the

solicitor reported simply that "we made him take it down." Although from the legal standpoint many other questions might have been involved here—whether the nonconformity rendered the walls unsafe, whether a properly informative notice was served on the builder—the actual abatement was made at the informal request of the municipal officials, and compliance was forthcoming without even a threat of legal action.

The essence of the law, contrary to popular belief, need not always be embodied in formal and litigious procedures. Everyone acquainted with rules of substantive law, pleading and evidence knows that these rules invariably favor out-of-court settlements in cases of a civil nature. The courts themselves feel that the necessarily long and expensive procedure of settling an issue in court should not be resorted to unless absolutely necessary. Matters settled out of court more often than not are likely to reach an equitable conclusion.

Of course, in criminal matters extra-legal compromises are much less favored. The enforcement of a municipal building code lies technically in a civil proceeding, but in some respects it is akin to a criminal case. In matters involving a contest of purely private rights, settlement beyond the guidance of a court, if badly performed, will affect only the immediate parties involved. However, the violation of a building code has a wider effect; in remedying such violations, the municipal authorities represent the interests not only of themselves and of the municipal corporation but also of other members of the public likely to be injured by the violation. For this reason, then, informal enforcement of building codes, although a procedure not to be frowned upon entirely, should be observed closely and measured from time to time against legal criteria in order to insure that the rights of the public and the rights of the alleged violator are not being trod upon.

Therefore this chapter discusses the legal bounds of building code enforcement. What is presented here is not a history of the way in which enforcement in the local units is actually managed, but rather a yardstick against which the actual enforcement procedures may be measured. Through a brief presentation of the statutory and judicial rules, this chapter intends to describe the

enforcement provisions which an ordinance ideally can contain, because the building ordinance itself should be the device which delimits the municipality's enforcement powers.

B. Fine or Imprisonment as Penalty for Violations

When legal sanctions are invoked in the enforcement of building codes, most common is that of penalizing violations by a monetary fine in order to coerce compliance. Because a local municipality has no power to create criminal liability, the proceedings to recover a fine are civil proceedings. Imprisonment is not a purely alternative sanction but may be invoked by a local municipality only for nonpayment of fine. Furthermore, it is very doubtful if a municipality can impose imprisonment for nonpayment of fine without express statutory authority to do so.

1. *Maximum Allowable Fines—A Statutory Problem*

Although at present no municipality in Allegheny County attempts to impose a fine exceeding \$100 for violation of building codes, in the future higher fines may be found desirable. The statutory limitations on the amount of fines which may be imposed for violations has been discussed in full in Section D of Chapter I, which deals with the statutes controlling building codes. The conclusions reached there should be repeated here because they are also appropriate to the content of this chapter. The maximum allowable fine which may be imposed by the ordinances of boroughs and second class townships has been pointed out to be in some doubt, but there is a possibility the boroughs and second class townships, like second class cities, can yet impose penalties up to \$500, while third class cities and first class townships are clearly restricted to a maximum of \$300. If we assume that the higher maximum which the legislature has granted to the first three classes named is a proper one, then it is illogical to confine third class cities and first class townships to that lower maximum. There is no basis for saying that the amount of maximum fine should be proportionate to the class status of the local unit imposing it.

Again, as stated in Chapter I, boroughs and second class townships need not await a legislative clarification of the statutes de-

fining the maximum fine which their ordinances may impose. Although there is a slight possibility that the maximum as to them may be only \$100 rather than \$500, they could, if they so desire, impose a fine exceeding \$100. Of course, there would be no judicial test forthcoming by merely including the higher maximum in the provisions of the ordinance; the maximum will be tested only when a violator who is ordered to pay a fine over \$100 contests it in court. In such a case, even if the higher maximum were successfully contested, the Pennsylvania courts have said that a fine may nevertheless be imposed up to that limit set as the lawful one.³⁹

Of course, this report does not intend to encourage such a test merely for the sake of clarifying the law. The legal effect of such a test is set forth here, however, in case municipal officials feel that a high fine should be available to them.

2. *Separate Offenses*

The maximum allowable amount of fine becomes less important as a practical matter, however, if the continuation of one violation may be construed as constituting a separate offense each day, week or month the violation is continued.

Pennsylvania statutes relating to housing matters contain provisions which make the continuation of one violation a separate offense for each period it is continued. The Plumbing Code⁴⁰ makes each day during which a person engages in the business of plumbing without a license a separate offense. The Tenement House Law⁴¹ makes each week of violation a separate offense.

Because the device is rarely employed, there are no appellate court cases in Pennsylvania on the subject. One old lower court case, however, has said that distinct penalties for such separate offenses may be incurred.⁴² The same case states that at the discretion of the court the actions for the recovery of the multiple penalties for the same breach may be consolidated in one action.

One doubt still remains in connection with the use of the separate-

³⁹ *Commonwealth v. Schaeffer*, 98 Pa. Super. 265 (1930).

⁴⁰ Act of June 7, 1901, § 71; as amended May 14, 1909, P. L. 840, § 14; March 31, 1937, P. L. 168, § 1; 53 P. S. 2630.

⁴¹ Act of March 25, 1903, P. L. 54, § 11; 53 P. S. 9101.

⁴² *Lancaster v. the Pennsylvania R.R.*, 12 Lanc. Bar 99 Pa. 1886.

offense device. The question is whether the recovery of several penalties for several separate offenses arising from the same breach would be limited by the maximum fine allowable by statute if the total of the several fines exceeds the statutory maximum. The statutes setting the maximum fines recoverable ordinarily merely state that the penalties may not exceed a specific amount for the "violation" of the ordinance. The issue here is whether the word "violation" means the separate offense which the ordinance declares shall arise anew with each period of time the original breach is continued. In view of the lack of any judicial pronouncement on the matter, the best assumption is probably that the word "violation" may refer to each separate offense, provided that the period stated by the ordinance to define each separate offense is a reasonable one; for example, an ordinance would be clearly unreasonable if it stated that a new and separate offense was to arise each and every hour a person continued a violation after he had been given notice to cease it. Whether or not periods of a day a week, or other periods are reasonable is up to the courts to decide. The conclusion of this report is that, after giving due notice to a violator, the municipality may consider each reasonably fixed period past which the violation is continued a separate offense; and if the period is reasonable, the statutory maximum fine will apply only to the fine imposed for each separate offense and will not prohibit a consolidated action to recover fines for several separate offenses arising from the same original breach, even though the total of the fines recovered on the basis of the several offenses exceeds the maximum which the statute allows for a "violation." An estimate as to what a reasonable period of time might be in this situation is presented subsequently in this subsection.

Regardless of the judicial rules which may arise on the subject, most ordinances in Allegheny County do state that the continuation of a breach may give rise to separate offenses. OAKMONT'S building code⁴³ provides in section 27 that "when not otherwise specified, each ten days that prohibited conditions are maintained shall constitute a separate offense." The ordinance of CLAIR-

⁴³ Ordinance No. 462, October 1, 1923; Recorder of Deeds Book No. 3, p. 554.

TON⁴⁴ also sets a ten-day period. But the most common provision in the county is that each day a violation is continued shall constitute a separate offense. The one-day provision is also contained in the *Abridged Building Code*⁴⁵ of the Building Officials Conference of America.

A different sort of provision may be suggested; the ordinance could provide that *each failure* to obey *new notice* of violation served by the building inspector is to constitute a separate offense.

This manner of determining separate offenses, making each new offense dependent on a refusal or obey a new notice, is the one recommended by this report.

It is the most fair and reasonable provision because it requires a positive act rather than inaction on the part of the enforcement officials in order to give rise to a new offense. As far as the violator is concerned, it makes the new offense dependent upon him ignoring a definite notice; this method is better than creating new offenses automatically upon the expiration of absolute periods of time. When each day is made a separate offense, the product is a harshness which would cause most officials to be unwilling to enforce it; hence, as a result, such provisions are rarely operative at all.

3. *Use of Summary Proceedings to Recover Fines*

A municipality should be able to recover its fines in a justice of the peace or alderman's court rather than in the Court of Common Pleas. The lower costs and shorter time incident to summary proceedings in a court of limited jurisdiction make the use of that tribunal preferable to Common Pleas, which does have concurrent jurisdiction; there may always be an appeal to Common Pleas or to County Court, in Allegheny County.

The jurisdiction of aldermen and justices of the peace over actions for the breach of municipal ordinances is fixed by the following statute:

"The aldermen and justices of the peace of every city, incorporated township, and borough in this Commonwealth, shall have power to hear and determine actions of debt and penalty for the breach of any ordinance, by-law or regulation of such city, township or borough, in the same manner, and

⁴⁴ Ordinance No. 171, March 5, 1926; Recorder of Deeds Book No. 1, p. 105.

⁴⁵ § 104.5.

subject to the same right of appeal as debts under \$100, and such actions shall be instituted in the corporate name of such city, township or borough."⁴⁶

The legal question surrounding this jurisdiction in relation to building codes is whether such summary proceedings may be employed to recover fines which exceed \$300. The jurisdiction of aldermen, magistrates, and justices of the peace is generally limited to \$300 as follows:

"The aldermen, magistrates and justices of the peace, in this commonwealth, shall have concurrent jurisdiction with the courts of Common Pleas of all actions arising from contract, either express or implied, and of all actions of trespass and of trover and conversion wherein the sum demanded does not exceed \$300, except in cases or real contract, where the title to lands or tenements may come in question, or action upon promise of marriage."⁴⁷

As one Pennsylvania writer, Mr. Sidney Schulman, has pointed out,⁴⁸ even if certain classes of municipalities in Pennsylvania had the power to impose penalties up to \$500, under the Housing Act of 1937⁴⁹ there is no power to collect those full penalties by summary proceedings, because they may be beyond the jurisdiction of the aldermen and justices of the peace courts. The Housing Act itself does not mention the use of summary proceedings; hence the question will depend upon how the courts construe the statutes which have been quoted here.

To predict accurately how this matter will be resolved by a court is impossible. The acts of 1835 and 1849, dealing expressly with actions for breach of municipal ordinances, do not state a limit on the penalty recoverable by summary proceedings. They only state that the suits shall be maintained in the same manner as suits for recovery of debts under \$100; the reference to debts under \$100, by a literal reading of the statutes, is made merely for the purpose

⁴⁶ Act of April 15, 1835, P. L. 291, § 7; 42 P. S. 291. A later act, although worded a little differently, is exactly the same in effect, Act of April 5, 1879, P. L. 409, § 7; 42 P. S. 292.

⁴⁷ Act of July 7, 1879, P. L. 194, § 1, 42 P. S. 241.

⁴⁸ Schulman, *Housing Legislation in Pennsylvania*, 13 TEMPLE L. W. 166 (1939).

⁴⁹ Discussed in full in Chapter 1, Section D of this report.

of describing the appeal and procedural rights which shall accompany the municipal enforcement actions, and not for the purpose of limiting the amount sought to be recovered in such enforcement actions.

The effect of the later, more general act of 1879 is more doubtful, however. It limits the jurisdictional amount to \$300 in actions "arising from contract, either express or implied, . . ."; the courts may hold that "actions of debt for a municipal penalty" are actions upon an implied contract and that they thus come within the limitation of the later statute.

Thus, this is still another matter to be clarified by the legislature. If the legislature wishes at least some of the classes of municipalities to be able to impose fines exceeding \$300, then the statutes should expressly allow the recovery of the higher amounts by summary proceedings.

C. Positive Remedies

The reason for imposing a fine or imprisonment for the violation of the building code is not to increase the municipality's revenue or the population of the municipality's jails, but rather to coerce compliance with the building code, the construction aspect of a remedial housing program. Although the real purpose of fines is hence to achieve positive compliance, on its face it appears to be a negative means, a penalizing of non-conformity rather than a compelling of conformity. There are other legal processes which may be employed directly to compel conformity. In this section they are gathered under the heading of "Positive Remedies." They include the power to enjoin violations through judicial process and the power to abate nonconforming buildings or parts thereof either by judicial or summary process, which includes the power of the municipality itself to make the abatement and charge the cost to the violator.

1. *Enjoining Violations By Judicial Process*

The power of a municipality to go into court and obtain a judicial command directed against a builder ordering that builder not proceed with construction which would be in violation of building regu-

lations must be conferred upon the municipality by statute, unless the threatened construction would constitute a nuisance. When a statute was not present, Pennsylvania courts have held that an ordinance forbidding the construction of frame buildings within certain districts cannot be enforced by an equity injunction and that the borough must rely upon an action at law for a monetary penalty.⁵⁰ The injunction remedy cannot be used without a statute unless the building constitutes a nuisance.⁵¹

The definition of a nuisance will be discussed in full later in this chapter; briefly, however, a building will constitute a nuisance only when it is so constructed that it may endanger the safety, health, comfort, or morals of a substantial segment of the population. Of course, an allegation that a particular building is a nuisance must be supported by evidence; as one case has stated, a bill in equity to enjoin the continuation of an allegedly unsafe building cannot be maintained on the ground that it might fall and endanger passers-by if strong evidence to that effect is not presented by the municipality.⁵²

Buildings which merely fail to conform to all the provisions of the building code are not necessarily nuisances unless they meet the definition stated above. Without a statute governing the matter, a noncomplying structure cannot be made a nuisance simply by declaring in the ordinance that noncomplying structures shall be considered nuisances. The courts will not restrain the threatened violation of an ordinance where the act is not a nuisance in fact, but is only declared to be such by the ordinance.⁵³ Where a court is asked to exercise equity jurisdiction (injunctions are sought in equity proceedings), one of the requirements is that no adequate remedy at law is available; the courts have said that where there is a remedy at law, such as a monetary fine, they will not grant an injunction without a command from the legislature.

Today, however, municipalities may get an injunction on the

⁵⁰ *South Chester Borough v. Stevenson*, 2 Del. 399 (Pa. 1885); *Honesdale Borough v. Weaver*, 2 Dist. 344 (Pa. 1893).

⁵¹ *Williamsport v. McFadden*, 15 W. N. C. 269 (Pa. 1884); *Lancaster v. Shaub*, 7 Lanc. 340 (Pa. 1890); *Ellwood City v. Mani*, 16 C. C. 474 (Pa. 1895).

⁵² *Pittsburgh v. Nicholson*, 53 Pitts. L. J. 185, 190 (Pa. 1905).

⁵³ *Cambridge Springs Borough v. Moses*, 22 Pa. C. C. 637 (Pa. 1889).

basis of statutes as well as on the ground that the violation constitutes a nuisance. The Housing Act of 1937⁵⁴ expressly grants to second class cities the power to obtain an equity injunction compelling compliance with the building code. Such a power is also contained in the Borough and Second Class Township Codes. Third class cities enjoy a similar provision,⁵⁵ as also do first class townships.⁵⁶ Although the proceedings are statutory in origin, the courts have said that such actions will be conducted in much the same manner as ordinary equity injunction proceedings.⁵⁷

Thus today injunction proceedings may be employed even where the violation would not constitute a nuisance.

2. *General Powers to Abate Nuisances*

Because the legal concept of nuisance has long been defined by the courts, if a building not only violates particular provisions of the building code but, in addition, constitutes a nuisance in fact, the power of municipal authorities to abate it even without resort to judicial proceedings is clear.

How have courts defined a nuisance? *Commonwealth v. Italian-American Republican Club*⁵⁸ says:

"A public nuisance has been defined as the doing of or the failure to do something that injuriously affects the safety, health, or morals of the public, or works some substantial annoyance, inconvenience or injury to the public, and as a nuisance which causes hurt, inconvenience or damage to the public generally or such part of the public as necessarily comes in contact with it."

If the building does constitute a nuisance within this judicial definition, municipal authorities may abate it summarily, without resorting to court proceedings at all.⁵⁹ However, things which are not nuisances cannot be summarily abated even if they exist in

⁵⁴ Act of April 14, 1937, P. L. 313, § 2; 53 P. S. 2225.

⁵⁵ Third Class City Code § 4133, as revised by Act No. 164, 1951.

⁵⁶ Act of June 24, 1931, P. L. 1206, Art. XV, § 1502, Cl. XIX; as amended June 20, 1939, P. L. 477, § 1; May 27, 1949, P. L. 1955, § 31; 53 P. S. 19092-1502, Cl. XIX.

⁵⁷ *Philadelphia v. Bartell*, 139 Pa. Super. 319, 11 A. 2d 563 (1939).

⁵⁸ 33 Del. 313, 316 (Pa. 1944).

⁵⁹ *Klinger v. Bickel*, 117 Pa. 326, 11 Atl. 555 (1887).

violation of an ordinance.⁶⁰ Municipal authorities who summarily abate structures which are not nuisances will be held liable in damages to the owner.⁶¹

3. *Effect of Ordinance Declaring Noncomplying Buildings to be Nuisances*

As shown by Element XI of Table E, about 47% of the ordinances analyzed contain a provision which declares flatly that buildings erected in violation of the ordinance shall be deemed nuisances. Among the ordinances which contain such a provision are those of BRADDOCK Borough,⁶² MARSHALL Township,⁶³ SEWICKLEY Borough,⁶⁴ McCANDLESS Township,⁶⁵ SHALER Township,⁶⁶ SWISSVALE,⁶⁷ and SPRINGDALE.⁶⁸

Under Pennsylvania law local municipalities do not have the power by an ordinance declaration to make something a nuisance which is not a nuisance in fact. *Westlawn v. Schaeffer*⁶⁹ declared:

"A municipal corporation has no power to declare conclusively . . . things to be nuisances, but can only declare such of them as are in fact so."

Other Pennsylvania cases agree; a matter which is not a nuisance in fact cannot be declared one by local legislative fiat.⁷⁰

Statements made in at least one Pennsylvania case appear to be contrary to these holdings, but in this one case the issue, whether

⁶⁰ *Easton Ry. Co. v. City of Easton*, 133 Pa. 505 (1890).

⁶¹ *Brink v. Borough of Dunmore*, 174 Pa. 395, 34 Atl. 598 (1896); *Fields v. Stokely*, 99 Pa. 306 (1882).

⁶² Ordinance No. 501, March 5, 1940, § 6; Recorder of Deeds Book No. 1, p. 193.

⁶³ Ordinance No. 2, September 11, 1945, § 42; Recorder of Deeds Book No. 1, p. 248.

⁶⁴ Ordinance No. 472, July 5, 1916, § 3(b).

⁶⁵ Ordinance No. 1, June 7, 1946, § 41.

⁶⁶ Ordinance No. 240, March 3, 1931, § 41; Recorder of Deeds Book No. 2, p. 219.

⁶⁷ Ordinance No. 1050, July 16, 1935, § 46; Recorder of Deeds Book No. 3, p. 468.

⁶⁸ Ordinance No. 195, August 9, 1920, § 12; Recorder of Deeds Book No. 1, p. 74.

⁶⁹ 24 Berks. 176 (Pa. 1931). The court cites from 19 RULING CASE LAW 817.

⁷⁰ *Allegheny v. Heyl*, 26 Pitts. L. J. (O. S.) 70 (Pa. 1878); *Borough of Manorville v. Flenner*, 286 Pa. 103, 133 Atl. 30 (1926). Of course, if the matter before the court happens to be a nuisance in fact, there need be no concern about the ordinance's declaration. *Commonwealth v. Yost*, 11 Pa. Super. 323, 344 (1899); reversed on other grounds, 197 Pa. 171 (1900).

an ordinance declaration that a matter is a nuisance makes that matter equivalent to a common law nuisance, was not squarely raised. *Pittsburgh v. W. H. Keech Company*⁷¹ suggested that a municipal ordinance could declare matters to be nuisances when they were not so in fact. However, the issue in that case was simply whether or not the defendant was liable for the monetary fine. The court said that in such an action to enforce the monetary penalty, the only question is whether the offender had done the prohibited act. Hence, although the court forbade the defendant to defend on the ground that his violation was not a nuisance in fact, the court did not do so because the municipality had power to decide what was a nuisance, but rather merely because such a defense was not relevant to the issue of whether his act was such as to incur a fine. *Commonwealth v. Baker*⁷² was decided similarly. In that case the court said that in an action merely to recover a fine, the distinction as to whether or not a junkyard, declared a nuisance by the ordinance, was a nuisance in fact was unimportant. Dictum in the *Baker* case impliedly agrees with the weight of authority in Pennsylvania, because it contains a statement that in an action to abate a nuisance there might be merit to the defendant's contention that his acts did not constitute a nuisance in fact.

Thus we see that where a building ordinance declares that all noncomplying structures are "public nuisances," such declaration is made in excess of the lawful powers of the municipality. They will not be given effect by the courts of the state unless the non-complying structure does happen to be a true nuisance.

Because many people believe that all statements made in a municipal ordinance are law and do not know that the legal effect of an ordinance is subject to statutes, constitutions, and judicial decisions, these declarations may serve as a bluff by which violators may be talked into taking steps which they could not by law be compelled to take. Whether local governments should attempt to implement their program of regulation with unenforceable bluffs is questionable.

On the other hand, there is one place in the building code where

⁷¹ 21 Pa. Super. 548, 533 (1902).

⁷² 160 Pa. Super. 640, 53 A. 2d 829 (1947).

a nuisance declaration may be legal and advisable. This place is the "unsafe building" clauses. If the ordinance properly defines what buildings are unsafe, construction sought to be abated under these clauses probably will meet the judicial definition of a nuisance in fact and will be legally subject to abatement.

WILKINSBURG'S building code⁷³ in article XXXVIII has a well-drafted paragraph defining the meaning of unsafe buildings. If a building comes within this definition, the building inspector may order a correction of the condition. If the order is not obeyed, the borough council may tell the inspector to proceed with the work specified in his order, or the council may begin an action in the Court of Common Pleas to compel compliance.

An example of a provision which declares a nuisance, but which is probably honest in doing so, is contained in the *Abridged Building Code* of the Building Officials Conference of America. Section 106.6 of that code, entitled "Nuisance Abatement Order," states that "whenever an existing building is damaged to an extent of 50% or more of the replacement value, and the damage is not repaired or the *nuisance* is not abated, the building official shall serve a written order . . . to abate the nuisance" within 30 days. A failure to obey the notice will subject the owner to a monetary fine. After 60 days the municipality may remove or make emergency repairs to the structure and charge the cost to the owner, which is to be secured by a lien on the property. This provision handles the matter very well except for the authorization to repair; in Pennsylvania new statutory authority would probably be required in order to give the municipality the power to make repairs unless they were merely incident to the condemnation and demolishing. The fact that this section specifies a rather exact measure of the nuisance, damage to the extent of 50% of replacement value, is its best point. A building damaged to that extent will, as a practical matter, almost always constitute a nuisance.

Another section of the *Abridged Code* confers upon the building inspector the authority summarily to abate buildings which are unsafe; this section does not use the term "nuisance" but, of course, summary abatement may be used only where the structure is a

⁷³ Ordinance No. 1369, April 19, 1949; Recorder of Deeds Book No. 2, p. 305.

nuisance in fact. This section, 106.7, defines unsafe buildings sufficiently well to insure that they will constitute nuisances.

4. *Statutory Powers to Correct Nuisances and Noncomplying Buildings*

If the legislative bodies of local municipalities do not have the power to declare that which is not a nuisance to be a nuisance, is the state legislature under the same disability? Mr. Justice Holmes in a Massachusetts case⁷⁴ said, "It is settled that, within constitutional limits not exactly determined, the legislature may change the common law as to nuisances, and may move the line either way, so as to make things nuisances which were not so . . . although by so doing it affects the value or use of property." Of course, if the constitutional limits of such action are "not exactly determined," Mr. Justice Holmes was stretching a point when he said that the matter is "settled."

A hurried glance at Pennsylvania statutes relating to municipal law gives the impression that the Pennsylvania legislature has declared many things to be nuisances which are not actually such. However, some of these statutes are mentioned here to dispel the impression. Those municipal law statutes which talk about nuisances fall into four categories, those dealing with fire regulation, those concerned with health, those which apply to true nuisances, and those enabling the local units to pass general building construction regulation.

Fire Regulations: All classes of municipalities in Allegheny County except second class townships contain in the statutes applicable to them a legislative declaration that a building not complying with safety and incombustibility ordinances shall be a "public nuisance and abatable as such."⁷⁵ All these sections are

⁷⁴ *Commonwealth v. Parks*, 155 Mass. 531, 30 N. E. 174 (1892).

⁷⁵ Second class cities: Act of March 7, 1901, P. L. 20, Art. XIX, § 3, Cl. XXXVII, 53 P. S. 9679.

Third class cities: Act of June 23, 1931, P. L. 932, Art. XLI, § 4102; 53 P. S. 12198-4102.

Boroughs: Act of May 4, 1927, P. L. 519, Art. XII, § 1202, Cl. XXI; as amended July 10, 1947, P. L. 1621, § 40; 53 P. S. 13333.

First class townships: Act of June 24, 1931, P. L. 1206, Art. XV, § 1502, 53 P. S. 19092, Cl. XX.

worded in substantially the same manner. The section applicable to first class townships serves to illustrate them all:

[The board of townships commissioners shall have the power] "To provide for the inspection of the construction and repair of buildings including the appointment of one or more building inspectors; to prescribe limits wherein none but buildings of noncombustible material and fireproof roofs shall be erected or substantially reconstructed or removed thereinto. . . . Any building erected, reconstructed, or removed, contrary to the provisions of any ordinance passed for any of the purposes herein specified, is declared to be a public nuisance and abatable as such."

Some of the sections applicable to other classes include a reference to "safety" in addition to the reference to incombustibility; the section in the borough code also confers the power "To make regulations for the construction of new buildings, and repair of old ones. . . ." Although such sections state that buildings contrary to the provisions of *any* ordinance passed for *any* of the purposes specified shall be deemed a nuisance, the courts are likely to apply to these sections the judicial canon that statutes derogatory of the common law are to be construed strictly. If the nuisance phrase refers only to buildings which are unsafe or buildings of incombustible material located within the prescribed "limits" (which are presumably fire limits), no great change in the common law meaning of nuisance is indicated. In many cases such buildings would amount to true nuisances anyway. Where they do not, as where the nuisance phrase attempts to refer to buildings which merely violate some provisions of "regulations for the construction of . . . buildings," it is unlikely that a court would permit these sections to uphold actions of municipal officials which generally could be taken only against common-law nuisances, such as summary abatement without compensation.

Health Regulations: Second and third class cities have been given by the legislature powers with regard to buildings dangerous to health, powers which resemble those conferred by the common law as to nuisances.

In the case of second class cities the pertinent statute⁷⁶ empowers

⁷⁶ Act of April 29, 1911, P. L. 103; 53 P. S. 9011-9016.

the department of public health to order the vacation of a building "previously occupied by a person infected with contagious diseases, or which by reason of want of repair has become dangerous to life, or is unfit for use and dangerous to health. . . ." Furthermore, section 2 of this act says that "Whenever any building . . . shall, because of age, infection . . . , defects in drainage, . . . the existence of a nuisance on the premises, or conditions tending to cause sickness among its occupants or among the occupants of other property in said city . . . be unfit for occupation or a menace to public health," the department of public health may order the building to be removed. The act provides for adequate notice. This statute does not amount to a declaration of an artificial nuisance; the act by its terms applies to buildings which inevitably would constitute true nuisances.

In the case of third class cities the pertinent portion of the third class city law⁷⁷ is not as clear. It states that the council may empower the mayor to petition the court of common pleas setting forth that certain buildings in the city have become public nuisances "injurious or dangerous to the community and to the public health." Then the statute says:

" . . . if the nuisance complained of be not a nuisance, *per se*, then the court may appoint three viewers . . . to . . . view the property."

Some things are defined by the common law as nuisances because of their very nature. These are nuisances *per se*; the court may act upon them without appointing a board of viewers. Where the property in question is not a nuisance *per se*, the viewers are appointed to determine if it is a nuisance in fact.

If it is, then the viewers are to find "what, if any, compensation" is to be paid to the owners for suffering its abatement. In this act there are also adequate provisions for notice and appeal. Although this statute states that the nuisance is to be abated, the provision for compensation is a little confusing; compensation need not be awarded for the abatement of a true nuisance. However, this act

⁷⁷ Act of June 23, 1931, P. L. 932, Art. XLI, §§ 4140-4143 as revised by Act No. 164, 1951.

also by its terms appears to embrace only real nuisances and does not attempt to declare a nuisance that which is not actually one. The provision for compensation apparently is included only to temper the harsh common law rules concerning nuisances.

Regulations Relating to True Nuisances: All classes of municipalities are given express statutory power to prohibit true nuisances. These statutes do not mention noncompliance with ordinances as a definition of nuisance, but merely state the word "nuisance" without explaining it. They are construed by the courts as relating to that which at common law would be a nuisance.

This interpretation of these statutes is confirmed by the fact that most of them expressly provide that, as at common law, after an owner fails to remove the nuisance in accordance with notice to do so, the municipality may itself remove the nuisance. Furthermore, these statutes allow the municipality to collect the cost of such removal from the owner.

General Building Construction Regulations: The enabling act which empowers second class cities, boroughs, and second class townships to enact building construction regulations⁷⁸ has been discussed previously several times in this report. Although the second section of this act mentions abatement, it does not attempt to declare a building which fails to comply with any provision of a local building code a nuisance. It merely empowers the authorities to "institute appropriate actions or proceedings at law or in equity" to abate the violation. These words confer only the power to seek a judicial injunction and do not confer any of the powers incident to the abatement of true nuisances, such as summary abatement without judicial proceedings. The statutes applicable to first class townships⁷⁹ and third class cities⁸⁰ are worded in exactly the same manner and confer the same powers.

These statutes which relate particularly to building construction and the enactment of building codes do not declare mere non-

⁷⁸ Act of April 14, 1937, P. L. 313; as amended June 20, 1939, P. L. 474; 53 P. S. 2224-2226.

⁷⁹ Act of June 20, 1939, P. L. 477, § 1; as amended May 27, 1949, P. L. 1955, § 31; 53 P. S. 19092-1502, Cl. XIX.

⁸⁰ Act of June 23, 1931, P. L. 932, Art. XLI, § 4121; 53 P. S. 12198-4125.

complying buildings all to be nuisances, nor do they confer upon municipal authorities powers over noncomplying buildings such as they have at common law over true nuisances. Thus an examination of these building code enabling statutes helps reaffirm the interpretation that those other statutes which do talk about nuisances refer only to true nuisances. For the most part, then, the Pennsylvania legislature has not attempted to change the common law definition of what is a nuisance. Municipal authorities, despite ordinance declarations to the contrary, may treat violations of their building codes as nuisances only if they really endanger the public safety, health, and welfare.

PART TWO
ZONING REGULATION

INTRODUCTION TO PART TWO

Zoning: Its Purpose and Relation to Other Aspects of Housing Regulation

As the Institute of Local and State Government of the University of Pennsylvania has pointed out, zoning has three central purposes:

1. To promote health by reducing housing congestion;
2. To protect land values by preventing the introduction of enterprises which would cause the deterioration of residential neighborhoods;
3. To reduce the costs of municipal government.

One aspect of the reduction of municipal expenses which should be kept in mind is that, where the zoning ordinance provides setback building lines, the cost of widening streets in the future will be reduced. When the municipality exercises the power of eminent domain to take property on either side of an existing street, the compensation will be lowered if there is no structure existing in the space taken.

There are other equally important purposes underlying zoning in addition to those pointed out by the Institute of Local and State Government. The area restrictions in zoning ordinances also serve to reduce fire hazards. And if off-street parking requirements are included in the zoning ordinance, the effect will be to reduce traffic congestion formerly caused by on-street parking; thus in turn traffic safety will be promoted.

The relation of zoning to other aspects of housing regulation is especially apparent when the purposes of zoning are compared with the purposes underlying building construction regulation. Both zoning and building codes have the same objectives of protection against safety and health hazards. Zoning, of course, is also an integral part of an over-all planning program. The zoning ordinance regulates land use and the area which may be occupied on private land; the over-all planning program completes the picture by covering street layout and the location of parks and public buildings. Preferably the enactment of a zoning ordinance should follow the formulation of the over-all plan.

Zoning is also allied with subdivision control. Subdivision control represents a complementary means of preserving a street pattern and insuring a reasonable shape and size for building lots.

Approach to the Study of Zoning in Allegheny County

The material presented in Part Two of this report has been approached in a different manner than the building codes were in Part One. In the case of zoning codes the age of ordinances is a consideration of lesser importance because zoning ordinances, unlike building codes, do not contain technical engineering provisions which rapidly become obsolete with the advance of scientific knowledge. The age of zoning codes has its chief effect upon their form, because where an old basic zoning ordinance is retained and amended over a long period of time, the long series of amendments distorts the format and makes the code much more difficult to understand; this effect is especially apparent in the case of Pittsburgh's zoning code originally enacted in 1923, which now has about 430 amendments. But the content of zoning codes is not as responsive to the age of the original ordinance as in the case of building codes. In addition, partly because of the less technical content of zoning codes, public interest and public pressure to keep the content of zoning codes consistent with changing conditions makes itself felt much more readily. This pressure of public interest is, of course, the cause of the frequent amendments mentioned above.

The zoning code pattern differs from that of building codes in Allegheny County in another respect. Throughout the county the legal and administrative provisions in zoning ordinances are much more uniform than those of building codes. In fact the various legal provisions are worded in almost identical manner in many of Allegheny County's zoning codes. For this reason the study of local ordinances made in this Part of the report has not required as large a sample to be studied. The size and content of the sample ordinances which provide the basis of this zoning study are described by Table G.

Because of the high degree of uniformity in the legal and administrative content and the general format of zoning ordinances

TABLE F
ZONING CODES EXISTING IN ALLEGHENY COUNTY AS OF
JUNE 30, 1950

	Allegheny County <i>including</i> the City of Pittsburgh	Allegheny County <i>excluding</i> the City of Pittsburgh
NUMBER OF MUNICIPALITIES		
Total Number of Municipalities	129	128
Number of Municipalities Which Have Zoning Codes	72	71
Percentage of the Total Num- ber of Municipalities Consti- tuted By Those Which Have Zoning Codes	56%	55%
POPULATION		
Total Population of All Municipalities (1950 Census Estimates)	1,508,255	834,492
Population of Municipalities Which Have Zoning Codes (1950 Census Estimates)	1,241,336	567,573
Percentage of the Total Population Constituted By Municipalities Which Have Zoning Codes	82%	68%
AREA		
Total Area (1939) of All Municipalities	467,200 acres	432,578 acres
Area (1939) of Municipalities Which Have Zoning Codes	251,613	216,991
Percentage of Total Area (1939) Occupied by Muni- cipalities Which Have Zoning Codes	54%	50%

TABLE G
SAMPLE GROUP OF ZONING CODES ANALYZED

NUMBER OF MUNICIPALITIES	POPULATION (1950 Census Estimates)			AREA
	Percentage of Number of All Municipalities	Total Population of Municipalities in Sample Analyzed	Percentage of All Municipalities Outside Pittsburgh Having Codes (567,573)	Total Area of Municipalities in Sample Analyzed
Number of Codes in Sample Analyzed	Outside Pittsburgh Having Codes (71)		Outside Pittsburgh Having Codes (207,295)	
20	28%	200,983	35%	47,781
				23%

in Allegheny County, an estimate of the entire county picture can be gained from detailed study of a sample. The sampling is comprised of those municipalities which submitted copies of their ordinances to the Pittsburgh Housing Association; these ordinances were most conveniently available for study. The copies, in most cases the unamended versions of basic ordinances, were studied in detail and then brought up to date by an examination of their amendments in the Recorder of Deeds' office.

Although the sampling was thus chosen upon the arbitrary basis of convenience and although it is overweighted on the side of boroughs and underweighted with regard to second class townships, it nevertheless represents a rough cross section by classes, of municipalities outside Pittsburgh which have zoning ordinances.

Class of Municipality	Number of Municipali- ties Which Have Zoning	Percentage of All Mu- nicipalities Outside Pittsburgh Having Zoning (71)	Number in Sampling	Percentage of Total Number in Sampling (20)
Third Class Cities	2	3%	0	0%
Boroughs	46	65%	16	80%
First Class Townships	10	14%	3	15%
Second Class Townships	11	14%	1	5%

The sample was composed of the zoning ordinances of the following municipalities:

Avalon Borough	Munhall Borough
Ben Avon Borough	Osborne Borough
Ben Avon Hts. Borough	Swissvale Borough
Bradford Woods Borough	Thornburg Borough
Brentwood Borough	Wilkinsburg Borough
Castle Shannon Borough	Mt. Lebanon Township
Dormont Borough	North Versailles Township
Edgewood Borough	Shaler Township
Emsworth Borough	Penn Township
Glassport Borough	Robinson Township

CHAPTER IX

STATUTES RELATING TO ZONING ORDINANCES— POLITICAL SUBDIVISIONS OTHER THAN THE COUNTY

A. Necessity of Enabling Statute

The necessity of a grant from the state legislature delegating police power to local municipalities so that they may enact building codes has been discussed in Part One. The same rule applies with regard to zoning, perhaps even more strongly because the connection of zoning regulations with the objectives of health, safety, and general welfare is not quite so close and direct as in the case of building codes. Pennsylvania courts have affirmed the requirement that the enactment of zoning ordinances must be done in pursuance of statutory authorization.¹

B. The Existing Pattern of Enabling Statutes in Pennsylvania

1. *General*

The whole body of statutes relating to zoning may be divided into four groups. The largest group, and the one with which this report is primarily concerned, is the set of enabling statutes which confer upon cities, boroughs, and townships the power to enact zoning ordinances.

The second group of statutes is only a potential one, at the date of this writing. In the 1951 session of the legislature several bills were introduced to confer upon the state government the power to formulate zoning regulations dealing with land owned by the state and land immediately abutting on state highways. This group of bills, even if passed, will not affect the subject matter with which this report deals and hence they are not discussed here.

The third category is composed of one statute only, the Airport Zoning Act which confers upon local municipalities the power to formulate zoning regulations controlling the height of structures located within the hazard area of airports.

A fourth group of statutes is composed of the provisions which

¹ *Jordan v. Township of Lower Merion*, 34 D. & C. 551, 55 Montg. 20 (Pa. 1938).

confer zoning powers on counties. These statutes are very closely allied with the enabling acts which confer zoning powers on political subdivisions other than counties. However, they will be treated separately in the last chapter of this report, because of their significance in providing an integrated program of regional zoning.

In this chapter, only the Airport Zoning Act and the statutes dealing with second and third class cities, boroughs and townships are discussed.

Like the zoning ordinances themselves the enabling statutes relating to the zoning powers of these classes of municipalities are much more uniform than are the statutes relating to building codes. This uniformity is explained when we examine the source material upon which the Pennsylvania legislature has relied in the promulgation of zoning enabling statutes. The act of 1923 which first conferred zoning powers upon first class townships² and the later acts and amendments relating to all classes were modeled upon the Standard Zoning Enabling Act, which many states follow. The Standard Zoning Enabling Act was drawn up by the federal government for the convenience of state legislatures which might desire to use it. The revised edition of January, 1923, was prepared by an advisory committee³ appointed by Herbert Hoover when he was Secretary of Commerce. The group which drew up the Standard Act was composed of especially able experts in the field, and the value of their work is attested to by the fact that at one time about half the states had adopted it; in fact as the Pennsylvania legislature has amended the Pennsylvania statutes from 1923 to the present time, each amendment has tended to adopt more and more of the Standard Enabling Act.

2. *Comparative Description of the Pennsylvania Enabling Statutes*

As pointed out above, the enabling statutes affecting the different classes of municipalities have many features in common. Thus the

² Act of June 29, 1923, P. L. 958; 53 P. S. 15731.

³ The members of the advisory committee were: Edward M. Bassett, lawyer for New York's zoning committee; Irving B. Hiatt, realtor; John Thlder, housing consultant; Morris Knowles, consulting engineer; Nelson P. Lewis, municipal engineer; J. Horace McFarland, civic investigator; Fred L. Olmstead, landscape architect; Lawrence Veiller, housing expert; John M. Greis, Chief of Division of Building and Housing of the Department of Commerce.

statutory pattern in Pennsylvania can be abstracted and described by discussing the act presently applicable to first class townships and comparing it with the acts relating to other classes for the purpose of demonstrating the few dissimilarities.⁴

Powers: The first class township statute, which is used as a sample here because it is the one most recently amended, empowers township commissioners to regulate the height, size, and construction of buildings and allows them to prescribe "the percentage of lot that may be occupied," the size of open spaces, the "density of population and the location and use of buildings, structures, and land." The zoning ordinances may also establish building lines on public streets.

The powers of other classes of municipalities are defined in like manner. In the case of second class cities the description is a briefer one and omits an express mention of building lines.⁵

In the act relating to second class townships, the powers are much more limited than in the other classes. The pertinent section⁶ describes the scope of the powers in the same manner as the first class township act does, but in second class townships:

"The power . . . shall be suspended . . . during any period of time that any zoning ordinance, adopted pursuant to law by the county commissioners of the county, shall continue to be in effect in such township, or part of a township, and any ordinance adopted by any township before the adoption of such county ordinance shall likewise be suspended during such period."

Thus the zoning powers of second class townships are at present

⁴ The statutes presently applicable to the different classes of municipalities are: Second class cities: Act of March 13, 1927, P. L. 98; 53 P. S. 9813; Third class cities: Act of June 23, 1931, P. L. 932, Art. XLI, §§ 4110-4112 recently revised by Act No. 164, 1951, §§ 4101-4129; Boroughs: Act of May 4, 1927, P. L. 519, Art. XXXIII, § 3301; present zoning statute added by the Act of July 10, 1947, P. L. 1621, amended by Act No. 217, 1951, § 8, § 93; 53 P. S. 15211.1-15211.9; First class townships: Act of June 24, 1931, P. L. 1206, Art. XXXI, §§ 3101-3110, as amended May 27, 1949, P. L. 1955, § 49; 53 P. S. 19092-3101-3110; Second class townships: Act of May 1, 1933, P. L. 103, Art. XX, §§ 2001-2010; present zoning statute added by the act of July 10, 1947, P. L. 1481, § 47; 53 P. S. 19093-2001-2010.

⁵ Act of March 13, 1927, P. L. 98, § 1; 53 P. S. 9183.

⁶ Act of May 1, 1933, P. L. 103, Art. XX, § 2101, added July 10, 1947, P. L. 1481, § 47; 53 P. S. 19093-2001.

made subject to county zoning powers. However in the 1951 session of the Pennsylvania legislature, at the time this report was being readied for publication, several bills had been introduced which would change this relationship between county and second class zoning ordinances. Senate Bill 693, a proposed new county code, would if enacted operate to prevent county zoning ordinances from superseding second class township zoning ordinances which are already in force. But under the proposed bills, a county zoning ordinance could govern the area within those second class townships (or any other class of municipalities) which have not enacted zoning ordinances prior to the county's action.

Second class townships' zoning ordinances are at present subject to an additional limitation. The statute states that the power cannot be exercised if taxpayers whose property valuation amounts to 51% or more of the total property valuation within the township or within the zoning district affected, sign and file a written protest in the Prothonotary's office.

A bill, House Bill 1518, also introduced in the current session of the Pennsylvania legislature, proposes to amend this second class township act so that such a taxpayers' protest could forestall action only for two years and not indefinitely as the present provision operates.

Districts: The first class township statute, our central example here, then states that in execution of the powers the municipality may be divided into districts. It requires that "regulations shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in another district."

Other classes of municipalities have comparable sections applicable to them.

The most dissimilar provisions are those relating to second class townships and boroughs. The statutes applicable to both of these classes contain very confusing subsections⁷ in the sections relating

⁷ Boroughs: Section 3302 (b) of the Borough Code, added by the Act of July 10, 1947, P. L. 1621, § 93; 53 P. S. 15211.2 (b). Second class townships: Section 2002 of the Second Class Township Code.

to districting. They are explained and discussed in detail in Section A-2 of Chapter X.

Purposes: The first class township statute exhorts the commissioners to make their regulations "in accordance with a comprehensive plan," with a view toward lessening street congestion, achieving fire safety, promoting health, and facilitating "the adequate provision of transportation, water, sewerage, . . . and other public requirements" for the purpose of the general welfare. The regulations must be made with a consideration for the character of the district and the appropriateness of use.

All other classes of municipalities contain a like definition of the purposes of zoning ordinances.

Conflict with Other Laws: The first class township act states that where zoning ordinances impose higher standards than those required by any other statute or ordinance, the provisions of the zoning ordinance shall govern; on the other hand if the requirements of the zoning ordinance are lower, the other statute or ordinance shall govern.

This sort of provision is contained only in the first class township and second class city statutes. The other classes do not have any like it.

Zoning Commission: In order to exercise the statutory powers, first class township commissioners must appoint a commission of five citizens as a zoning commission to make a preliminary report, hold public hearings, and then submit a final report. The township commissioners cannot hold their public hearings nor enact an ordinance until they have received the final report of the zoning commission. An existing township planning commission may act as the zoning commission.

Third class cities and boroughs have a similar provision, but in the case of second class cities the city planning commission is expressly designated as the body to make the report.

The statute affecting second class townships states that the zoning commission may consult the State Planning Commission.

Enactment of Ordinances: In first class townships the commissioners must "provide by ordinance the manner in which such regulations and restrictions and . . . districts shall be determined

... and ... amended." However, no regulation can be enacted until after a public hearing has been held in pursuance of a notice published in "an official paper or a paper of general circulation . . . once a week for two weeks."

In second class cities the statute requires simply 15 days' notice in an official or general paper. In third class cities the notice must be published by two insertions in a newspaper ten days prior to the hearings of council.

The borough statute details the nature of the notice and requires that it contain "a brief summary setting forth the principal provisions of the proposed ordinance" in reasonable detail. The provision relating to second class townships is similar to that relating to boroughs. The periods of notice required to be given in boroughs and second class townships are uncertain. They are discussed in full in Section A-2 of Chapter X.

Amendments: In first class townships the zoning ordinance may be amended from time to time, but if the owners of 20% or more of the area of the lots included in the proposed change, or of the lots immediately adjacent in the rear, front or side extending 100 feet from the proposed change, sign a protest against the amendment, the amendment can be passed only by the vote of $\frac{3}{4}$ of all the members of the board of commissioners. The requirements of hearing and notice for the enactment of an ordinance also apply equally to an amendment of it.

The statutes relating to other classes are very similar. However in the case of second class cities, the city planning commission must be given 20 days' notice of the proposed amendment. In third class cities, passage of an amendment in the face of such a protest requires the vote of all four councilmen. In second class townships, the vote of a majority of all the supervisors is required.

In the case of boroughs and second class townships, the requirements of hearing and one-week notice for the enactment of an original ordinance "may" be employed for amendments. If the amendment involves a change in district boundaries, possibly the confused districting provisions discussed in Chapter X require 15 days' notice, however.

Board of Adjustment: The statutory sections relating to the board

of adjustment are alike with regard to all classes of municipalities. The board of adjustment is to be appointed by the local legislative body. It is given the power to hear appeals from administrative determinations, to decide special exceptions which the ordinance leaves to its discretion, and to authorize variances. All the enabling acts also provide that a statutory appeal may be taken to the common pleas court from decisions made by the board of adjustment.

Enforcement: All municipalities may in pursuance of their general penalty powers impose a monetary fine for violation of the zoning ordinance and imprisonment for default of payment thereof. In addition the zoning enabling acts of third class cities, boroughs, first class townships, and second class townships expressly allow the municipal officials to institute actions in equity to prevent or abate violations by injunction. The zoning statutes covering second class cities, however, do not contain such an express authorization for the use of equity injunctions.

3. *Airport Zoning Act*

In addition to the zoning enabling acts which severally vest powers in particular classes of municipalities, Pennsylvania also has an additional zoning enabling act which vests power in all political subdivisions in the state, including counties. This act is the Airport Zoning Act passed in 1945.⁸

The purpose of this act is to permit local governments to zone areas surrounding airports for the prevention of hazards to aviation and to neighboring residents which may be caused by the presence of high structures in the way of the landing glide path of aircraft using the airport. The third section of the act declares that airport hazards are public nuisances contrary to community interest and that their establishment should be prohibited by the exercise of the police power without compensation.

Powers: The act empowers every political subdivision, including counties, which has an airport hazard area to adopt airport zoning regulations. If the airport is located in one political subdivision and the hazard area is located in a different political subdivision,

⁸ Act of April 17, 1945, P. L. 237, 2 P. S. 1550-1553.

the two (or more) political subdivisions may create a joint airport zoning board with the power to adopt zoning regulations. Each such board is to consist of two members appointed by each participating subdivision with the chairman to be elected by a majority of the members.

A very unique provision of this act is the one which provides that if a political subdivision which has an airport decides that a neighboring political subdivision in which the hazard area of that airport is located has failed to adopt necessary zoning regulations and has also failed to join in the creation of a joint board, the political subdivision which has the airport may adopt and enforce airport zoning regulations which will govern the hazard area located in the other political subdivision. Furthermore such extraterritorial airport zoning regulations will prevail if they conflict with the ordinary zoning regulations of the other political subdivision having the hazard area. This unique power which is given political subdivisions to impose extraterritorial zoning regulations upon other political subdivisions is a surprising power but is nevertheless justified and valid. The legislature may confer upon political subdivisions the power to govern extraterritorially.

Enactment: The fifth section of the act permits airport zoning regulations to be incorporated in the general zoning ordinance. In case of a conflict between the two, the more strict requirement prevails.

Before an airport zoning regulation is enacted, an airport zoning commission must be appointed to recommend the regulations and the boundaries of the zones. An existing planning or zoning commission may be appointed as the airport zoning commission. The commission must make a preliminary report and after giving 15 days notice must hold public hearings. The commission then embodies its recommendations in a signed report submitted to the local legislative body or to the joint airport zoning board. The political subdivision's legislative body or the joint board must then also give 15 days' notice, published in one newspaper of general circulation in the municipality in which the hazard area is located and in the local legal periodical prior to holding the public hearing.

The seventh section of the act requires that the regulations be

reasonable and necessary ones which take into consideration the character of airport operations, the nature of the terrain and of neighboring property uses.

Non-Conforming Uses: The regulations cannot change non-conforming uses except to require them to be marked and lighted. However when elimination or lowering of a non-conforming structure is necessary or when zoning regulations are limited by constitutional provisions so that they cannot give sufficient approach protection, the act provides in section 14 that the political subdivision or subdivisions may acquire air rights, aviation rights or other interests in real property in order to solve the problem. If aviation rights are acquired, compensation must be paid for the taking and for the cost of relocating a structure which must be moved to a new location.

Permits: Before new structures are erected within a hazard area or whenever an increase in the height of an existing structure is proposed a permit must be obtained from the political subdivision. However no permit is required for the repairing or for the partial replacement of an existing structure when the height of the structure is not increased. Persons owning a non-conforming structure must apply for a permit in order to replace or rebuild the non-conforming structure. The act states that no permit shall be granted which will allow the creation of a hazard or the increase of a hazard.

Board of Adjustment: The board of adjustment which administers special matters under airport zoning may be an existing board of adjustment or a new one consisting of five members appointed for three years.

The board may grant variances as in the case of general zoning ordinances. In the granting of variances such a board may impose conditions such as requiring the addition of markers and lights to the structure.

The board of adjustment may also decide special exceptions if the zoning regulations make provision for them. The board has the usual function of hearing appeals.

Section 12 of the statute provides for judicial review of board of adjustment decisions as in the case of other zoning ordinances.

Enforcement: Like the other zoning enabling statutes, this Air-

port Zoning Act provides that political subdivisions may institute actions, including actions in equity, for the purpose of correcting or abating violations of airport zoning regulations.

Conflicting Regulations: If the airport zoning regulations of one political subdivision conflict with the airport zoning regulations of another political subdivision with regard to the same area, the more stringent requirement prevails. If the extraterritorial airport zoning regulations of a political subdivision having an airport conflict with the general zoning regulations of the other political subdivision in which the hazard area is located, the airport zoning regulations prevail.

Conclusion: This Airport Zoning Act is an admirable one, although it is poorly organized in some respects. In substance it provides all the powers necessary to support municipal control of the height of structures which stand near the landing approaches to airports. No political subdivision in Allegheny County has adopted new airport zoning regulations under this act. The advantages of airport zoning regulations will be discussed in Chapter XII, Section H.

C. Statutory Requirement That Zoning Ordinances Be Submitted to Recorder of Deeds

1. *The Act of 1949*

The statute⁹ which requires all zoning ordinances to be "filed" in the county Recorder of Deeds' office has already been discussed at length together with the similar statute covering building codes in Chapter II of this report. These two statutes are worded in the same manner; the lone distinction between the two is that the zoning ordinance statute includes also the requirement that the zoning map as well as the ordinance text be "filed". Hence the conclusions and recommendations set forth in Chapter II with regard to the building code statute are equally applicable to the zoning code statute.

The wisdom of the statutes requiring building and zoning ordinances to be submitted to the Recorder of Deeds should be re-examined by municipal officials and legislators. The possibility of

⁹ Act of May 14, 1949, P. L. 1340; 53 P. S. 261-263.

more effective means of making building and zoning ordinances accessible to the public should be considered. Mentioned in Chapter II was a bill now pending in the 1951 session of the Pennsylvania legislature, House Bill 1515 which would repeal the 1949 acts and substitute a new law which requires only that municipalities which have building and zoning ordinances must file certificates to that effect in the Recorder of Deeds' Office. Although such a change if enacted would dispense with the difficulties which have arisen from the vague terminology of the present statutes, a mere filing of a certificate that an ordinance exists would not make the text of ordinances available to interested persons.

The problem of making municipal ordinances available to the public is primarily the responsibility of the local governments themselves, not the responsibility of the state legislature which cannot be well acquainted with the unique situations existing in various local municipalities.

If the ordinance recording acts of 1949 are retained by the legislature, however, several other recommendations are pertinent:

(a) Although research into the legislative intention behind the statutes, as evidenced by legislative floor debates, indicates that a court would likely construe these statutes as requiring only filing, not recording, *the definition of compliance with the statutes should be clarified*; the statutes should in unmistakable terms explain whether certified copies of ordinances are merely to be filed by the Recorder of Deeds or transcribed verbatim into the Recorder's books.

(b) *The statutes should expressly make the primary index the sole evidence admissible in court as to whether an ordinance has been filed or not.*

(c) The statute now states that an ordinance shall be void and of no effect if not "filed" in compliance with the act. *The statute should be clarified so as to make plain the absence of a need for reenactment of a pre-existing unfiled ordinance in order finally to file that ordinance and place it again in force.*

At the time of this writing, this last recommendation was being dealt with by two bills which have been submitted to the Pennsylvania legislature. These bills, House Bill 1447 and Senate Bill 263,

if enacted would operate to validate building and zoning ordinances which have become void because of non-compliance with the 1949 acts. The bills state that if void ordinances are filed any time before the bill is passed or within a named grace period after the effective date of the bills, such ordinances would be validated without the necessity of a reenactment of them by the local legislative body.

2. *Effect Upon Contracts for the Sale of Land*

The central purpose of the act requiring the submission of zoning ordinances to the Recorder of Deeds' office apparently is simply to provide a central location at which all the ordinances in the county can be found. The legislative journal of the Pennsylvania General Assembly indicates that such was the purpose in a brief debate over the building code statute; the zoning statute was passed without debate, but because the two statutes are very similar and because they were introduced by the same sponsors, the same purpose probably also was behind the zoning statute.

There remains to be considered the effect, if any, of this statute upon private conveyances of land. Specifically, one question which has arisen in the courts is whether zoning ordinances affect the rights and remedies of parties to a contract for the sale of land.

The recordation of *deeds* of land in the Recorder of Deeds' office is very important in the law involving sales of lands. However, because zoning ordinances are laws and as such have always been matters of public record, the courts of several states¹⁰ agree that a person who has contracted to purchase land cannot rescind the contract merely because he learns that the land is subject to a restriction by an existing zoning ordinance. However if the sale of land includes a building already erected upon the land in violation of a zoning ordinance, a different question is presented—a question which was considered by the Pennsylvania Superior Court in *Moyer v. De Vincentis Construction Co.*¹¹ In that case the court

¹⁰ *Wheeler v. Sullivan*, 90 Fla. 711, 106 So. 876 (1925); *Dazwell v. Reynolds*, 250 Ill. App. 174 (1928); *Lincoln Trust Co. v. Williams Bldg. Corp.*, 229 N. Y. 313, 128 N. E. 209 (1920); *Millman v. Swan*, 141 Va. 312, 127 S. E. 116 (1925); *Miller v. Milwaukee Odd Fellows Temple*, 206 Wis. 547, 240 N. W. 193 (1932).

¹¹ 107 Pa. Super. 588, 164 Atl. 111 (1933).

held that a buyer of land could rescind the contract because the title was unmarketable, but the court was careful to point out that the title was rendered unmarketable not because of the mere existence of a zoning ordinance, but "because a building had been constructed upon the lot in violation of that ordinance."

Hence, the new requirement that, in addition to being available in the local municipality's office, zoning ordinances be made available in the county office will not affect the rights of private parties to land transactions. Their rights will be affected if the land contains structures which will actually violate the ordinance, but the act of 1949 of course affects only the ordinances themselves and does not require that existing violations be made a matter of public record.

CHAPTER X

PROBLEMS IN THE ENACTMENT AND AMENDMENT OF ZONING ORDINANCES

A. Statutory Procedure

1. General

In order to enact zoning ordinances validly, municipal legislative bodies must, of course, adhere to the legislative procedure prescribed for the enactment of all types of ordinances. In addition, the state legislature has provided certain requirements of study, notice, and public hearing as prerequisites to the promulgation of zoning ordinances. Where a municipality fails to follow these statutory requirements, such as where it fails to publish a copy of the zoning plan, the zoning ordinances will be invalid and of no effect.¹²

The statutory provision that municipalities within the several classes must appoint a special zoning commission or utilize the city planning commission as one is clear. The appointment and functioning of a zoning commission is an indispensable condition precedent to the validity of a zoning ordinance. This rule was strikingly demonstrated in Allegheny County when a former zoning ordinance of ROSS Township was held invalid.¹³ The Ordinance, No. 371 of 1947, was challenged by a landowner who contended that it was invalid because no zoning commission had been appointed to hold public hearings and make a report to the township commissioners. The township officials argued that a zoning commission had been appointed and functioned in 1929 when the much earlier Ordinance No. 118 was passed, but the evidence was clear that there had been no zoning commission hearings prior to the enactment of Ordinance No. 371 of 1947. The Common Pleas Court of Allegheny County stated that the appointment of a zoning commission in 1929 did not meet the statutory requirements with regard to the enactment of Ordinance No. 371, and that because of the lack of a zoning commission, Ordinance No. 371 was invalid and could not be enforced by the township.

¹² *Fierst v. Wm. Penn. Memorial Corporation*, 311 Pa. 263, 166 Atl. 761 (1933).

¹³ *Abbott v. Ross Township*, 98 Pitts. L. J. 483 (Pa. 1950).

The requirements that zoning commissions must make a preliminary report and then hold public hearings on that report before submitting final recommendations to the legislative body are salutary requirements. They attest to the proposition that the enactment of zoning ordinances requires a much broader base of public participation than is true in the case of building ordinances.

The requirement that the municipal legislative body itself must hold public hearings on proposed ordinances and amendments after giving a proper notice of the hearings is also a wise requirement. However as actually presented in the statutes, the provisions setting the amount of notice to be given are in some instances confusing. Furthermore, the variance between the notices required for each class of municipality is also so great that it invites criticism.

2. *Borough and Second Class Township Statutes; Required Notice for Enactment and Amendment*

In the Borough Code and the Second Class Township Code, both of which were revised by the same session of the legislature in 1947, the provisions relating to the required notice for hearings are in a puzzling state. The statutes applicable to both of these classes are almost identically worded and hence may be discussed jointly.

The sections relating to the *enactment of zoning ordinances* by either of these classes read as follows (the exact section quoted here is from the Borough Code):

"The council shall exercise the powers granted [in section 3301] [section 2001 in the case of second class townships] . . . by ordinance. . . . At least one week and not more than three weeks prior to the presentation of the proposed ordinance an informative notice of intention to consider such proposed ordinance . . . shall be published. . . ."¹⁴

Both statutes display confusion when the *enactment* sections are compared with the sections relating to *districts*, which read as fol-

¹⁴ Boroughs: § 3304 of the Borough Code, added by act of July 10, 1947, P. L. 1621, § 93, as amended by Act No. 217, 1951, § 8; 53 P. S. 15211.4. Second class townships: § 2004 of the Second Class Township Code, added by act of July 10, 1947, P. L. 1481, § 47; 53 P. S. 19093-2004.

lows (again the section from the Borough Code is the section quoted, but it is virtually identical with the second class township section):

“(a) For any or all said purposes, the council may divide the borough into districts, of such number, shape and area as may be deemed best suited to carry out the purpose of this article. Within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land. Such regulations shall be uniform for each class or kind of buildings throughout each district but the regulations in each district may differ from those in another district.

“(b) The council shall provide by ordinance the manner in which the boundaries of such districts shall be determined and established and from time to time amended or changed. However, no such boundary shall become effective until after a public hearing in relation thereto at which parties in interest and citizens shall have an opportunity to be heard. At least fifteen days’ notice shall be published in a newspaper of general circulation in such borough.”¹⁵

Note that this section on districts (§ 3302 of the Borough Code and § 2002 of the Second Class Township Code) sets a pre-hearing notice requirement of 15 days. Thus the notice required by the districts sections is different from that required by the enactment sections, which set a minimum of one week’s notice before hearing.

The ordinance enactment sections in both codes state that they apply when the supervisors “exercise the powers granted in section” 3301 (of the Borough Code) or section 2001 (of the Second Class Township Code), which sections are the general *grants of power* “to regulate . . . the height, number of stories, . . . buildings . . . , the size of yards, courts and other open spaces, the density of population,” and so forth. Thus the one-week minimum notice specified in the *enactment* sections (3304 and 2004) refers to the enactment of zoning ordinances which contain substantive regulations dealing with use, height, and area. These *enactment* sections

¹⁵ Boroughs: § 3302 of the Borough Code, added by act of July 10, 1947, P. L. 1621, § 93; 53 P. S. 15211.2. Second class townships: § 2002 of the Second Class Township Code, added by the act of July 10, 1947, P. L. 1481, § 47; 53 P. S. 19093-2002.

also state that the procedure relating to the adoption of such ordinance provisions "may likewise be adopted in amending . . . any of the provisions of the ordinance."

The sections relating to *districts* (sections 3302 and 2002) by their terms deal with ordinances fixing boundaries for the first time as well as with amendments of those boundaries. Ordinarily when a community enacts a zoning ordinance for the first time, the same ordinance specifies the regulations of use, height and area, and also contains provisions fixing the boundaries of the districts within which the different use, height, and area regulations apply. In such a case, which notice period is sufficient, the 15 days' notice specified by the districts sections or the shorter one-week minimum notice required by the enactment sections?

It is incomprehensible that the statutes should permit two different notice periods before a hearing is held on a single zoning ordinance; the statutes cannot mean that where a single original ordinance contains use, height, and area regulations and also contains provisions setting district boundaries, that one week's notice in advance is sufficient with regard to the substantive regulations and 15 days' notice is required with regard to the district boundary regulations.

The only way in which these two sets of sections can be construed together reasonably is to say that the longer notice period of the *districts* sections applies to all ordinances which contain any districting provisions at all. Even if these ordinances, either original codes or amendments, contain both districting and use-height-area regulations, the 15 days' notice period nevertheless applies to the entire ordinance.

Such a requirement would be a reasonable one; use-height-area regulations are readily comprehensible on their face, but a resident can learn how these regulations affect him only by finding out within which district he resides. The meaning and effect of district boundaries does not readily appear from the mere text of the proposed ordinance; ordinarily reference to a zoning map is required. Thus the longer notice period is a proper one to apply to original, basic ordinances which set districts boundaries for the first time.

Furthermore any amendments which change district boundaries will operate to move some properties from one set of use-height-area regulations to another, different set of rules. Thus, a change of boundaries is more sweeping than is an amendment which changes the use-height-area requirements within a district whose boundaries are left untouched; the effect of this latter sort of change is readily discernible since the persons affected are likely already to be aware of the designation of their district. Hence the longer notice period is also the more appropriate one for ordinances which contain any provisions amending district boundaries because the necessity of referring to a map for the interpretation of the new boundaries increases the length of time required for a considered study of the proposed amendment.

Reasonable as this construction of the statutes may be, however, it is cast into doubt by a puzzling sentence in the *enactment* sections; the last clause in these sections states that the procedure relating to the adoption of use-height-area regulations, the one-week notice procedure, "*may . . . be adopted in amending . . . any of the provisions of the ordinance.*" Read literally, this provision would mean that although the longer notice period is desirable for the original setting of district boundaries, when "*any . . . provisions,*" including district boundary provisions, are *amended*, the municipal officials are free to elect the short notice period. Such an interpretation of the statute is untenable; if the longer notice period is desirable for the initial districting, it should also be required to apply to changes of districts.

A more reasonable interpretation of this provision in the *enactment* sections is that, although it says "*any . . . provisions,*" it applies only to matters discussed within that same section, the use-height-area requirements. The *districts* sections contain very positive language applying the longer notice period to ordinances by which the district boundaries are "*determined and established and . . . amended or changed*"; they say that "*no such boundary shall become effective until after*" public hearing pursuant to fifteen days' notice.

Until these poorly-drafted sections are clarified by court or legislature, boroughs and second class townships can be certain of the

validity of their zoning ordinances by giving advance notice of 15 days, but not more than three weeks, before the enactment of a zoning ordinance or amendments which contain any provisions affecting district boundaries.

The legislature should clarify these sections of the Borough and Second Class Township Codes so that they are plainly susceptible of the interpretation given them here. Such clarifications should make clear the distinctions summarized in the following:

Basic, original zoning ordinances (as distinguished from amendments):

(a) If the basic ordinance contains no provisions affecting district boundaries at all, then the shorter notice period, at least one week and not more than three weeks, applies. (As stated above, this situation is an unlikely one. Inevitably the basic zoning ordinance will set boundaries to define the area of operation of the use-height-area requirements.)

(b) If the basic ordinance contains any provisions setting or affecting district boundaries, whether or not it contains use-height-area regulations in addition, the longer notice period of 15 days applies.

Ordinances which constitute amendments:

(a) If the amendment contains no provisions affecting district boundaries at all, then the notice period applicable to all types of ordinances applies, but the procedure for basic ordinances, including the notice period of at least one week and not more than three weeks, *may* be employed at the election of the municipal legislative body.

(b) If the amendment contains any provisions setting, changing, or affecting district boundaries, whether or not it contains use-height-area regulations in addition, the longer period of 15 days *must* be employed.

3. *Difference in Notice Requirements Between Classes of Municipalities*

Whether the notice required for the original enactment of zoning ordinances in boroughs and townships is settled upon as "fifteen

days" or "at least one week and not more than three weeks" before the legislative body's hearing, there is still a wide variance between these notice requirements and those required by the statutes applicable to the other classes of municipalities. As already stated in Section B of Chapter IX, in first class townships, notice of the consideration by the legislative body of a proposed ordinance must be published "once a week for two weeks"; this provision apparently requires first class townships to publish advance notice twice rather than once. In second class cities the statutes require simply 15 days' notice, which is taken to mean one published notice 15 days in advance of the hearing. Third class cities according to a 1951 revision of the law, must give only 10 days' notice by publishing a statement at least two times.

In the estimation of many zoning and planning authorities, these provisions for legal notices are relatively unimportant, however, because such notices usually escape the attention of the average newspaper reader. The suggestion has often been made that in smaller municipalities at least, the municipal authorities should use additional, more popular avenues of advertising to notify the citizens of impending consideration of a proposed zoning ordinance. The use of radio broadcasts or penny postcards has been put forth as suggested means.

Another discrepancy between the various classes is that in the case of second class cities and first class townships no particular form of notice is required; for these classes the notices need only state the "time and place" of the hearing. However in the case of boroughs and second class townships, as the statutes quoted in the preceding subsection of this report indicate, the notice must contain a summary of the ordinance's provisions and a "reference to the place or places . . . where copies of the proposed ordinance may be examined." The notice is to be in a form prepared by the Department of Internal Affairs in the case of second class townships.

Such requirements, intended to insure that the notice will be informative, should be applied to all classes of municipalities. Into the Third Class City Code of 1951, requirements similar to these have been added. If a legal notice can be expected to encourage public participation at all, it is more likely to do so if it states a summary of the provisions of the proposed ordinance.

4. *Protests Against Amendments*

The Pennsylvania statutes all contain a provision that if 20% of the property owners who would be affected by an amendment file a written protest, passage of the amendment then requires a vote greater than merely a simple majority of councilmen present.

This protest procedure is the only method available to a property owner who has a valid reason to oppose an amendment of a zoning ordinance. A Pennsylvania case has held that a property owner opposing a change cannot appeal to the courts either from the action of a zoning commission in recommending a change or from the action of the legislative body in making it; he must first use the written protest procedure, and if despite this procedure the legislative body passes the ordinance by the required additional number of votes, he then may appeal to the court for a judicial review of the amendment, but he will succeed in this last sort of appeal only if the amendment violates his legal or constitutional rights.¹⁶

Of course, within the bounds of statutory, judicial and constitutional limitations a legislative body may make all sorts of amendments to zoning ordinances. A Pennsylvania court has pointed out that a zoning ordinance which fixed the boundaries of districts did not constitute a contract between the municipality and persons occupying lots near the boundaries of those districts which would prevent the municipality from later changing the boundaries.¹⁷

5. *Stop-gap Ordinances*

The statutory procedure prescribed for the enactment of zoning ordinances is more complex and time-consuming than the procedure prescribed for any other type of municipal ordinance; this is true in almost every state as well as in Pennsylvania. The provisions requiring the appointment of a zoning commission, public hearings by that zoning commission, a report of the commission to the ordinance-enacting body, public hearings held by the ordinance-enacting body, final enactment of the ordinance and publication of it are designed to insure the public the fullest possible participation in

¹⁶ Grabosky v. McLaughlin, 36 D. & C. 215 (Pa. 1939).

¹⁷ Hollearn v. Silverman, 338 Pa. 346, 12 A. 2d 292 (1940).

the formulation of municipal regulations which will drastically affect the use of their property in the future. However many municipal officials have voiced a need for a statutory procedure which would authorize the passage of stop-gap ordinances to control property uses during the relatively long interim required for the enactment of the final ordinance. Whether this need is so great as to offset the desirability of providing for a long period of public participation in the formulation of the zoning plan is a question which, legally speaking, is in the hands of the legislature. The municipal officials claim that very frequently when a zoning program is contemplated, some property owners will attempt to avoid the intent of the forthcoming plan by hurriedly erecting structures or beginning activities which they know or suspect will be made non-conforming uses by the subsequent enactment of the zoning ordinance. A stop-gap ordinance would operate to prevent such persons from getting their uses in under the wire ahead of the comprehensive zoning ordinance.

Although stop-gap ordinances may be advisable, the Pennsylvania legislature has to date not seen fit to authorize them. The City of Harrisburg in 1949 attempted to pass and enforce such an interim zoning ordinance. The facts of the situation as described by the superior court were these:

A landowner intended to build garden-type apartments in an area suitable for residential uses other than multiple dwellings. On April 25, 1949, the landowner requested a building permit. On May 6 of the same year an interim ordinance was read and was finally passed on May 10, bearing an effective date of May 20. The ordinance created two residential districts and on its face was declared to be only a stop-gap ordinance to be in force until a comprehensive final zoning ordinance was passed. The Pennsylvania Supreme Court, adopting the superior court opinion, held the interim ordinance invalid¹⁸ because the enactment procedure required by the third class city law was not followed. The opinion stated that zoning ordinances can be enacted only under the zoning enabling statutes and not under the general police power sections of the municipal law. Although the opinion recognized the possible

¹⁸ *Kline v. Harrisburg*, 362 Pa. 438 (1949).

advisability of allowing stop-gap ordinances to prevent property owners from avoiding the provisions of a contemplated zoning ordinance, the judges said that specific legislative authority would be required. Court decisions from other states which upheld such stop-gap ordinances were held inapplicable to the Pennsylvania situation.

B. Non-Legal Aspects

In addition to the statutory requirement surrounding the enactment of zoning ordinances, there are certain non-legal aspects which should be pointed out here.

The most salient factor is one which has been touched upon already, the factor of public participation with regard to zoning ordinances. Where the incentive for the imposition of zoning requirements comes from the public itself, as is ordinarily the case, the problem is often one of restraining and channeling the intense clash of interests so as to direct the formulation of a coherent and consistent zoning plan. In Allegheny County there have been several instances in which local legislative bodies have surrendered to the intense push of public pressure and enacted zoning ordinances almost overnight in order to meet some real or imaginary immediate necessity.

The chances of developing effective zoning regulation in a community previously without it are much greater if the municipal officials take the first steps toward a study of the problem before public interest is generated so strongly as to cause too hasty a consideration of the problem. Thus if municipal officials who *foresee* that their citizens will in the near future begin clamoring for zoning regulation, will set up a zoning commission to make initial studies and then bring in the public for consultation by means of the statutory notice-and-hearing procedure and other means, the zoning ordinance will grow in an ideal environment. Already mentioned has been the possibility of supplementing the statutory notice requirements by extra-legal devices such as radio broadcasts, postcards or handbills. Also suggested has been the procedure of instituting neighborhood meetings to discuss impending zoning regulation; thus the early stages of the study are subdivided so as to

permit a greater amount of active public participation at the level at which zoning ordinances operate, the neighborhood level.

A basic rule put forward by zoning and planning authorities is that the zoning map should be drawn up in tentative form before the drafting of the textual provisions of the zoning ordinance begins. Thus the zoning map serves as a visual center upon which public interest may focus and which is more amenable to discussion and change than textual drafts would be.

Unlike the building code situation, no model zoning ordinances exist upon which a municipality may pattern its own. Although there are certain rules of form and many common legal and administrative provisions among zoning ordinances the substantive content of a municipality's zoning ordinance should be tailor-made so that it is fitted to the current stage of development of the local unit. If the local zoning can be enacted as part of a regional plan, it should also fit into the over-all program for the region.

The procedure for determining the content of subsequent amendments after an original zoning ordinance has been enacted should be legally and practically much the same as that employed for the original enactment.

Frequent amendments to zoning ordinances should be discouraged, at least if the original ordinance was carefully drafted with a long-range plan of development in view. The statutory protest procedure discussed previously in this chapter is helpful in this respect.

CHAPTER XI

EXISTENCE OF ZONING ORDINANCES IN ALLEGHENY COUNTY

According to Table F at the beginning of this Part, the job of zoning Allegheny County is about halfway accomplished. If Pittsburgh is excluded from the computations, about 55% of the municipalities, 68% of the population, and 50% of the area is governed by a zoning ordinance.

The need of those municipalities which do not have zoning at present for such legislation is not primarily a legal question. That need should be determined by a survey on a broad plane of the following municipalities, those which, according to best sources available as of June 30, 1951, had no zoning in force:

- | | |
|--------------------------|--------------------------|
| 1. Duquesne City | 27. Wall Borough |
| 2. Blawnox Borough | 28. W. Elizabeth Borough |
| 3. Brackenridge Borough | 29. W. Homestead Borough |
| 4. Braddock Borough | 30. Whitaker Borough |
| 5. Chalfant Borough | 31. Wilmerding Borough |
| 6. Coraopolis Borough | 32. Collier Twp. |
| 7. Dravosburg Borough | 33. Crescent Twp. |
| 8. E. McKeesport Borough | 34. East Deer Twp. |
| 9. E. Pittsburgh Borough | 35. Elizabeth Twp. |
| 10. Eden Park Borough | 36. Jefferson Twp. |
| 11. Elizabeth Borough | 37. Leet Twp. |
| 12. Haysville Borough | 38. Neville Twp. |
| 13. Homestead Borough | 39. Reserve Twp. |
| 14. Liberty Borough | 40. S. Fayette Twp. |
| 15. McDonald Borough | 41. S. Versailles Twp. |
| 16. McKees Rocks Borough | 42. Springdale Twp. |
| 17. Millvale Borough | 43. Aleppo Twp. |
| 18. Oakdale Borough | 44. Fawn Twp. |
| 19. Rankin Borough | 45. Findlay Twp. |
| 20. Sharpsburg Borough | 46. Forward Twp. |
| 21. Springdale Borough | 47. Frazer Twp. |
| 22. Tarentum Borough | 48. Harmar Twp. |
| 23. Trafford Borough | 49. Lincoln Twp. |
| 24. Turtle Creek Borough | 50. N. Fayette Twp. |
| 25. Verona Borough | 51. Patton Twp. |
| 26. Versailles Borough | 52. Pine Twp. |

- | | |
|-------------------------|--------------------|
| 53. Richland Twp. | 56. Snowden Twp. |
| 54. Sewickley Twp. | 57. West Deer Twp. |
| 55. Sewickley Hts. Twp. | |

Of course, even a casual glance at the above list shows that, for several of the municipalities there, the enactment of zoning ordinances at this date would be too late. Zoning alone could not prove very beneficial to older communities like DUQUESNE, BRADDOCK, HOMESTEAD, RANKIN and SHARPSBURG.

It is not possible to discuss the relative scope of zoning regulations in the manner it was discussed in the case of building codes. The content of Allegheny County's zoning ordinances, discussed in detail in the next chapter, is very uniform as far as subject matter covered is concerned. All the zoning ordinances provide at least one residential district, most provide for a commercial district, and a lesser number allow industrial uses.

Most of the ordinances district the entire municipality, but a few in actuality accomplish nothing than "spot" zoning; that is, they impose specific regulations only on part of the municipality.

Just as important as the substantive content of these zoning regulations are the legal and administrative devices which can be employed to make the regulations more effective. These matters are discussed in detail in the following chapters.

CHAPTER XII

GENERAL CONTENT OF ZONING CODES IN ALLEGHENY COUNTY

Note

The aim of this chapter is to give a general view of the scope and content of the zoning ordinances presently existing in Allegheny County. Because of the great similarities among most of the ordinances a description of the entire county picture is possible merely by stating how many of the 20 ordinances in the sampling study contain each type of provision described here.

Ordinance provisions not discussed in this chapter are those relating to administration, including provisions for boards of adjustment, and enforcement, which are all handled in Chapter XV. Some of the matters such as area requirements and nonconforming uses which are considered in a general fashion in this chapter are treated at greater length in Chapter XIV, because they pose particularly intricate legal problems.

A. Introductory Provisions

1. *Title and Description of Ordinance's Scope*

All the ordinances studied contain a complete title and, in addition, state that they may be referred to by the short title of "zoning ordinance."

None of the ordinances, however, contain a section describing generally the scope of operation which the zoning ordinance is intended to have. This omission is not a material one; such provisions are rare. Furthermore, because the chief factor determining the scope of a zoning ordinance is the extent to which it covers nonconforming existing uses and future changes of those uses, these matters may be more appropriately set forth in those parts of the ordinance which deal with non-conforming uses.

2. *Definitions*

Although many sorts of statutes and ordinances having a complex character are benefited when a section defining the words used therein precedes the substantive provisions, in the case of zoning

ordinances a definitions section is absolutely indispensable. For instance, when the substantive provisions of a zoning ordinance state that no structure shall exceed 35 feet in height, how is the height to be measured? Does the height allowance include projections such as cupolas, radio and television antennae, chimneys or, in the case of some commercial structures, water cooling towers? If the height is to be measured by the main roof of the building only, will the same standard be applied whether the roof is flat, gambrel, mansard, or gabled? These questions can conveniently be answered if there is a definition section.

If the draftsmen of a zoning ordinance do not include definitions in the ordinance itself or if they do not make the definition sufficiently full, they necessarily are leaving the job of clarification up to the courts. The extent and effect of judicial definition of words contained in zoning ordinances may be illustrated by a Pennsylvania case which dealt with a word contained in Pittsburgh's zoning ordinance. The provision being litigated was a section stating that the vehicular entrance door of a "garage" must be set back a distance of 15 feet from the street line. The word "garage" was defined in the ordinance not to include the "exhibition or showrooms for storage of new cars for sale," but there was no mention of repair work incidental to such business. The court was faced with the problem of deciding whether or not the vehicular entrance of a repair shop incidental to a new car showroom had to be set back 15 feet. The court decided that it did not, that the word "garage" did not embrace such a repair shop provided that it was in some way connected with the business of a new car dealer.¹⁹ Very possibly such an interpretation would go against the intent of the ordinance today because, as the automobile business is now conducted, repair shops connected with new car dealers are not only used for the purpose of maintenance of autos stored for sale, but also to provide a general repair service to all comers. If the 15 foot setback of the door is deemed necessary for major repair garages not connected with an automobile sales business and is based on safety considerations, the same considerations should also apply to bring within the setback requirements the entrance door of a garage

¹⁹ Appeal of Alpern, 291 Pa. 150, 139 Atl. 740 (1927).

which does a similar volume of repair work even though economically connected with a salesroom.

As might be expected, virtually all zoning codes in Allegheny County do contain definition sections. The lone exception in the sampling of 20 ordinances studied is the Borough of OSBORNE, which neither in its original ordinance²⁰ nor in its amendment of 1944, contains a single definition. All 19 of the others, however, contain more than ten definitions each.

B. District Classification

1. *Use Districts*

The first problem which zoning planners must face is to decide how many different use districts are to be established within the limits of the municipality. To a large extent the decision is already partially made for them by the existing relationship of residential, commercial, and industrial areas. However, they must also attempt to foresee the amount and direction of future development. Thus the establishment of general use district types is a problem peculiar to each municipality. Illustrative of this point is the fact that in Allegheny County there is considerable variance in the patterns of use district classification. Two municipalities, BEN AVON HEIGHTS²¹ and THORNBURG²² establish only one district, a residential one, for the entire municipality. The validity of such a procedure is discussed in connection with the examination of the legal problem of non-districted prohibited uses in subsection 3 of this section and also in Section B of Chapter XIV. Three of the ordinances studied fix two types of districts, one residential and one commercial. Another three local units have set up three classes within their borders, but only one of those three municipalities has an industrial district. The most common number of district classes used is four; eight ordinances in the group examined set up this number, and in all of them the ratio is two residential districts to one commercial and one industrial district. Three municipalities go further in district division and establish five districts. All of

²⁰ Ordinance No. 124, May 24, 1927; Recorder of Deeds Book No. 1, p. 33.

²¹ Ordinance No. 20, August 5, 1925; Recorder of Deeds Book No. 3, p. 577.

²² Ordinance No. 77, June 10, 1929; Recorder of Deeds Book No. 2, p. 233.

them contain three different grades of residential districts and one industrial district as well as a commercial district. Only one municipality examined establishes as many as six classes; that is PENN Township.²³

There are a few general rules to be kept in mind in setting use districts. One of them has been established as almost a legal requirement by the Pennsylvania courts. One case has said that the boundaries of use districts should be so fixed as to avoid making one side of a main thoroughfare purely residential where the other side has an established commercial character.²⁴ This requirement, of course, is not a rigid, inflexible one. However, it is an illustration of one of the points at which a court may look to determine the reasonableness of the establishment of use districts. At any rate it is a good rule to follow from a planning standpoint, because at the very least it tends to produce a better aesthetic effect.

Another general rule which is urged by planners is that zoning regulations should avoid "over-zoning," which is the setting aside of more land for business, industrial, or multiple dwelling uses than is actually needed. One authority has stated that sometimes 600% more land is set aside for business uses than is necessary. Although during the scope of this study it has not been possible to compute the amount of area set aside for each of the various uses in Allegheny County, it is unlikely that our local municipalities have overzoned with regard to the establishment of industrial districts, because where any of the municipalities studied have set up an industrial district at all, they have circumscribed it narrowly. For example, the Township of MOUNT LEBANON,²⁵ although it does nominally establish an industrial district, expressly limits the boundaries of that district to the properties occupied by the South Hills Ice Company and Duquesne Light Company; furthermore, MOUNT LEBANON prohibits manufacturing from being carried on anywhere within the township at all. The reasonableness of such narrow restrictions is discussed in Section B of Chapter XIV of this report.

²³ Ordinance No. 370, January 25, 1940; Recorder of Deeds Book No. 2, p. 324.

²⁴ *Freeman v. Lansdowne Borough*, 34 Del. 449 (Pa. 1947).

²⁵ Ordinance No. 594, May 24, 1926, as amended to date; Recorder of Deeds Book No. 3, p. 270.

An important consideration in Allegheny County, with its 129 different municipalities, is that use districts should not clash at the municipality's limits with the use districts of the adjoining municipality. Under present law the only way such a clash can be avoided is by joint consultation between the municipalities concerned. To assure that such clashes would not occur, it would be necessary for the legislature to give the county zoning power over all land within the county, rather than over only land outside of cities, boroughs, and first class townships as it has today. (See Chapter XVI of this report.)

2. *Area and Height Districts*

In some parts of the United States the zoning system of the municipalities is based upon only one set of districts; the one set of boundaries marks off the differences between all types of regulations, those relating to area and height as well as use. However, in Allegheny County the more common practice has been to establish separate districts for use and area and sometimes height regulations, although in a few cases the boundaries of these separate districts are coterminous. Such is the case in BEN AVON,²⁶ WILKINSBURG,²⁷ EDGEWOOD,²⁸ and GLASSPORT,²⁹ for example, where, although use and area districts are dealt with by separate designations, their boundaries are apparently coterminous with the boundaries of the use districts.

On the other hand, among municipalities in which the use and area districts do not match are AVALON,³⁰ with four use and three area districts, BRENTWOOD,³¹ with five use and four area districts, and EMSWORTH,³² with two of each.

C. District Explanation and Transition

Eight out of the 20 ordinances studied contain, in addition to the provisions which actually mark out district boundaries, an inter-

²⁶ Ordinance No. 359, October 24, 1924; Recorder of Deeds Book No. 3, p. 23

²⁷ Ordinance No. 1089, June 20, 1929; Recorder of Deeds Book No. 2, p. 281.

²⁸ Ordinance No. 412, April 16, 1925; Recorder of Deeds Book No. 3, 103.

²⁹ Ordinance No. 424, May 11, 1942; Recorder of Deeds Book No. 1, p. 281.

³⁰ Ordinance No. 763, August 2, 1940; Recorder of Deeds Book No. 2, p. 64.

³¹ Ordinance No. 251, June 13, 1929; Recorder of Deeds No. 2, p. 267.

³² Ordinance No. 416, May 11, 1925; Recorder of Deeds Book No. 1, p. 129.

pretive section which explains matters which may be obscure. Often these sections employ references to the zoning map, as does the section in WILKINSBURG'S code which reads:

"Section 45. BOUNDARIES OF DISTRICTS. Where uncertainty exists with respect to the boundaries of the various districts, as shown on the zone map, the following rules shall apply.

"(a) The district boundaries are streets unless otherwise shown, and where the designation on the zone map indicates a boundary approximately upon a street line, such street shall be the boundary.

"(b) Where the district boundaries are not shown to be streets and where the property has been or may hereafter be divided into blocks and lots, the district boundaries shall be construed to be lot lines; and where the designation on the zone map indicates a district boundary approximately upon lot lines, said lot lines shall be construed to be the boundary.

"(c) In undivided property, the district boundary lines on the zone map shall be determined by use of the scale of the map."

Such explanations are helpful. They should be contained in all zoning ordinances.

Closely allied with the problem of explanation of boundaries is the problem of boundary transition. Transition provisions as referred to here constitute more than mere explanations, however. They are provisions designed to provide for coherency in the zoning requirements at points where two districts meet. For example, if the lot lines are not made the district boundaries as in the WILKINSBURG section quoted above, there will be the problem of providing for a lot which lies partially in one use district and partially in another. Another situation which transition provisions cover is that occurring when a residential street intersects a thoroughfare both sides of which are zoned for commercial uses. Here the transition can be accomplished by making some provision for allowing or forbidding business entrances on the residential sidestreets.

Other transition problems arise in connection with area requirements. These are sometimes referred to as yard transition problems. For example, if residential district requirements require a rear yard

20 feet deep, wise planning will also require that comparable yards should be kept in industrial lots adjacent to the rear of the residential lots. Still another situation covered by transition provisions is that which involves corner lot area requirements where a corner lot is faced on one side by a residential street and on the other side by a commercial street.

None of the 20 ordinances of Allegheny County municipalities outside Pittsburgh which were studied by the Project contain any transition provision of the types above described. The statutory requirement that all regulations within a district shall be uniform may be a limiting factor here, because transition provisions involve setting up slightly different requirements for lots on the periphery of a district than for those within the interior of the district.

Certainly it is better to provide in advance for transition problems than to leave them to the after-the-fact determinations of the court. At least one case in Pennsylvania has dealt with the transition problem arising where one lot lies both in an industrial and a commercial district. In *Borough of Prospect Park v. McClaskey*³³ the superior court was faced with a situation in which a brick manufacturer occupied land partly in an industrial zone in a township and partly in the commercial zone of a borough. Manufacturing processes were carried on in the township industrial zone, but the brick manufacturer wanted to use a private driveway which extended over the borough commercial zone to bring in supplies and to haul out manufactured bricks. The court held that the transportation of supplies and bricks through the commercial portion of the lot did not violate the borough zoning ordinance which excluded from the commercial zone both "industrial uses" and "uses accessory to industry." This case stands as an instance of judicial liberalization of zoning requirements in the absence of transition provisions. Although this case involved districts in each of two municipalities, the same result would probably have been reached had both districts been located in the same municipality.

In another Pennsylvania case the court similarly loosened the exact zoning requirements when faced with a transition problem.

³³ 151 Pa. Super. 467, 30 A. 2d 179 (1943).

In *In re Gilfillan's Permit*³⁴ a lumber yard had been maintained wholly within a commercial district although the rest of the same lot was located in a residential district. The lumberman sought a permit to build a concrete lumber warehouse on the part of the lot in the residential district but was denied it by the municipality. On appeal the court reversed the denial and allowed the construction. The court pointed out that at least part of the lot had been used for lumber storage for a long time and that the building of a concrete warehouse would promote the safety aims of zoning by diminishing risk of fire.

These cases illustrate that the courts are aware of the especially difficult problems which arise where different districts meet. Those who draft zoning ordinances should attempt as far as possible to provide for the solution of these problems in advance.

D. District Use Regulations

1. *Non-Districted Prohibited Uses*

At least five of the 20 ordinances studied prohibit certain uses from being carried on anywhere within the municipality. In most cases these blanket prohibitions involve such hazardous occupations as high explosive manufacturing or offensive uses such as garbage reduction and slaughterhouses. Several other municipalities achieve the same effect by not providing for any industrial district, and still others reach a similar result by enumerating uses which are prohibited in industrial districts and limiting the use of commercial and residential districts only to certain permitted uses. Because the express mention in zoning ordinances of permitted uses impliedly excludes all other uses,³⁵ the net effect of these latter ordinances is also to prohibit certain uses anywhere within the municipality.

A blanket exclusion of industrial uses from an entire municipality in Allegheny County has been tested in the Pennsylvania Supreme Court.³⁶ The case involved the zoning ordinance of UPPER ST. CLAIR Township which made no provision for any industrial uses of property anywhere within the township. Before the supreme

³⁴ 291 Pa. 358, 140 Atl. 136 (1928).

³⁵ Appeal of Hasley, 151 Pa. Super. 192, 30 A. 2d 187 (1943).

³⁶ Mutual Supply Company Appeal, 366 Pa. 424 (1951).

court it was argued that such a blanket exclusion is unreasonable and invalid but the supreme court stated that such an exclusion did not automatically constitute a legal defect in the ordinance. On the other hand the supreme court did not indicate that such a blanket exclusion would necessarily always be valid. Whether or not such provisions are reasonable will probably continue to depend upon the particular facts appearing in each case.

The reasonableness and legality of such blanket prohibitions are discussed in greater detail in Section B of Chapter XIV.

2. Residential Use Regulations

Of course, all 20 of the ordinances studied contain provisions relating to residential districts, and all of them phrase these provisions in the form of permitted uses. The important factor here is coverage. Whether or not a municipality sets up more than one grade of residential district, the ordinance should by one means or another cover the different types of residential structures such as one-family residences, two-family duplexes, two-family double houses, row houses, and multiple dwellings. Of the ordinances studied all of them naturally mention one-family residences; 17 deal with duplexes and 16 with double houses. About a dozen make some provisions for multiple dwellings. The three ordinances which mention row houses do so only to prohibit them.

3. Exceptions to Use Requirements

Virtually all zoning ordinances in Allegheny County have provisions which enumerate certain exceptions to the general use requirements. In some cases these exceptions are expressed in order to expand the scope of permitted uses. For instance, nine of the ordinances studied expressly state that in addition to the dwelling house uses, property in residential districts may be employed for boarding house purposes, the providing of room and meals for a limited number of persons.

More often the exceptions are conditioned upon approval in each case being given by the zoning board of adjustment. For example, the ordinances provide that a grocery store may be established in a residential district if the board of adjustment gives permission;

the board of adjustment is ordinarily required to take into consideration the effect of the particular proposed use upon the whole nature of the district.

In many cases, however, exceptions will be granted only when the petitioner's application requesting an exception from the board of adjustment is accompanied by the written consent of a certain percentage of property owners in the neighborhood. Occasionally such consent requirements are subjected to the accusation that they constitute unlawful delegations of legislative power to private persons. The legal aspects of this question are discussed in Section B, Chapter XV, of this report dealing with the administrative problems and the functions of board of adjustment.

The influence of the automobile age is demonstrated when the subject matter of these exceptions are examined. Thirteen of the ordinances studied make provision for allowing storage garages as exceptions to use requirements, and ten of the ordinances have provisions dealing with motor vehicle repair shops, and fourteen allow filling stations to be established as exceptions in certain instances.

The most common sections enumerated which do not require action by the board of adjustment or the consent of neighbors are those which allow fences of restricted types and those which allow signs, restricted in residential districts to small name-plates or small signs advertising realty for sale or rent. Eleven of the ordinances studied contain the fence exceptions, and ten contain the sign exception.

Also commonly excepted from the general use provisions in residential neighborhoods are some institutional uses. Nine out of the ordinances studied permit such exceptions. Although in many places hospitals are commonly excepted, in the Allegheny County ordinances churches seem to be the most common exception in this class.

4. Accessory Uses in Residential Districts

In addition to specified matters which may be outright exceptions to general use requirement, 19 of the 20 ordinances in the sampling study permit uses which are accessory to residential uses. These

provisions often allow private garages, for example, provided they are built in conformity with area requirements, and other sorts of uses which normally are considered closely allied with residences.

An Allegheny County case has explained the meaning of ordinance provisions which allow accessory uses which are "customarily incident" to residential uses. The facts of the case, *Stark's Appeal*,³⁷ involved a Roman Catholic church located in a Pittsburgh residential district. The church wished to use a building on the rear of the lot as a dormitory for retreatants during closed retreats. (Closed retreats are religious exercises extending over a period of several days during which the retreatants, those attending the retreat for the purpose of prayer and meditation, remain constantly upon the church or monastery premises.) The Pittsburgh Board of Adjustment granted permission for the use of the building as a dormitory even though such multiple dwellings were not permitted in the district as basic uses. The decision of the Court of Common Pleas of Allegheny County which upheld the board's action pointed out that a limitation of a particular denomination's church to uses that are customarily incident to other churches would amount to an unconstitutional invasion of freedom of religion. Although the decision was strongly founded upon the constitutional ground of religious freedom, the court also pointed out that the retreat dormitory would definitely come within the meaning of accessory uses. The judge stated that "accessory uses" means those uses customarily incident to buildings of the general type rather than uses customarily incident to any particular building.

Another interesting recent case involving accessory uses also arose in Allegheny County, involving the zoning regulations of MUNHALL Borough. In that case a resident of a B residence district who was an amateur radio operator desired to erect a 32 foot radio tower on the premises of his residence. His application for a building permit was denied by the building inspector, whose action was in turn upheld by the Munhall Board of Adjustment. Supported by a national association of radio amateurs the home owner appealed to Common Pleas Court of Allegheny County where the judge reversed the action of the Munhall Board as being arbitrary

³⁷ 72 D. & C. 168 (1950).

and capricious.³⁸ The general rule in these cases is that whether or not a particular structure or activity comes within the meaning of accessory uses is a fact to be found by the board of adjustment, whose findings will not be overturned by the reviewing court unless they are arbitrary, capricious and unreasonable to a high degree. Upon a further appeal by the board to the Pennsylvania Superior Court, the common pleas decision was reversed,³⁹ but a final appeal by the radio amateur to the Supreme Court of Pennsylvania⁴⁰ resulted in that court reversing the superior court and upholding the decision of the common pleas court. The supreme court agreed with the common pleas judge that the erection of such a radio tower would be a reasonable accessory use. The supreme court's opinion pointed out that television and radio antennae are commonly seen erected in connection with the use of a building as a residence. According to the high court's opinion, an action of the zoning board of adjustment which would have the effect of interfering with the use of property without a rational relation to safety, health, morals or welfare cannot be sustained. The court discussed at length the nature of the fundamental rights to the free use of private property so long as such use does not invade the rights of others. Although the supreme court did not expressly say that the Munhall Board of Adjustment had abused its discretion, the effect of the decision is equivalent to such a statement. The terms of the ordinance itself did not expressly forbid the erection of amateur radio antennae. Because the terms of the ordinance itself were not invalid, the basis of the supreme court's decision must have been that the action of the board of adjustment was invalid.

Where the zoning ordinance does not expressly make provision for accessory uses, Pennsylvania courts will allow them under the judicial "doctrine of accessory uses." This doctrine, employed in the interpretation of permissive residential uses, has long been given legal recognition by the judiciary. In the absence of a specific detailed provision in the zoning ordinance, the doctrine of accessory uses may operate to allow certain uses normally allied with resi-

³⁸ *In re: Appeal of Lord*, 97 Pitts. L. J. 289 (1949).

³⁹ *Munhall Borough Appeal*, 168 Pa. Super. 299 (1951).

⁴⁰ *Appeal of Lord*, 81 A. 2d 533 (1951).

dential area uses to be permitted as if they were expressly allowed by the words of the ordinance. The courts will consider the entire circumstances, including the history of the policies of the administrative officers who are charged with the enforcement of the ordinance, in order to reach a reasonable application of the doctrine. Where a resident of a dwelling district in MOUNT LEBANON had conducted a private school in her home for two years without a protest from the authorities, a court did not permit the township officials thereafter to enjoin the conducting of the school as violative of residential use requirements.⁴¹ According to the facts of that case, in the district in question MOUNT LEBANON'S zoning ordinance⁴² limited uses to (1) single family dwellings, (2) private garages, (3) buildings for the housing of animals and fowls, (4) fences, and (5) churches. The challenged use was a kindergarten school which occupied as classrooms the rooms in a residence normally used as living and dining rooms and also the front room on the second floor. Playground equipment was placed in the yard area surrounding the house. The rest of the building was occupied by the school proprietor as her residence. The court learned that MOUNT LEBANON officials had been allowing in residential districts the conduct of uses such as those enjoyed by physicians and dentists who received patients in their homes, real estate operators who maintained offices in their homes, plumbers, contractors, and radio repairmen who exhibited advertising of their occupations, beauty parlors, music and dancing teachers, a nursery school with 15 students, and a catering business. By tolerance of these uses, all of which were incidental to residences, the court said that the MOUNT LEBANON officials had recognized the doctrine of accessory uses and had extended it to include the operation of such schools as that in question. The court said that MOUNT LEBANON officials could not have one law applicable to the proprietor of the kindergarten school and another law applicable to all other groups.

⁴¹ *Richards v. Johns*, 88 Pitts L. J. 351 (Pa. 1940), appeal dismissed, 338 Pa. 232, 13 A. 2d 59 (1941).

⁴² Ordinance No. 594, May 24, 1926, Art. III, § 2; Recorder of Deeds Book No. 3, p. 270.

In such cases the courts will always consider all facts available. In another case, which involved Pittsburgh, the courts said that a 20-bed nursing home could not be considered merely as an accessory use.⁴³ By way of dictum in that case the Court of Common Pleas of Allegheny County pointed out that:

"A customary accessory use is where an owner occupies a house as a home for himself and family, and incidentally keeps boarders, as distinguished from a use where the house is occupied for the purpose of keeping boarders and the keeper of the boarding house and his family live in the house also."

The sense of this quotation seems to be that in order to be accessory, the use must be an incidental, not the principal use.

If municipal zoning officials do not wish their ordinances to be subjected to this judicial doctrine of accessory uses, they can avoid it by including in the ordinance express prohibitions of undesirable uses which might be incidental to the main use of a dwelling as a residence.

E. District Regulations of Area

1. *Area Requirements*

Next to the use requirements the most important limitations imposed by a zoning ordinance are those which require certain areas to be left unoccupied. Area regulations have a very direct relation to the elimination of health and fire hazards. They are also linked with street-widening problems, because where set-back building lines are provided, the widening of streets through the exercise of eminent domain by municipal authorities is made less expensive.

The first approach to area requirements is the setting of minimum lot sizes. The minimum lot size can be defined simply in terms of area, or it can be defined in terms of minimum length and width, or it can be defined by both methods.

Among the 20 Allegheny County ordinances studied, 15 set minimum area requirements for lots in residential districts. Fourteen set minimum areas in commercial districts, and three set minimum areas in industrial districts; however, because such regulations are

⁴³ Appeal of Hasley, 90 Pitts. L. J. 205 (Pa. 1942); affirmed 151 Pa. Super. 192, 30 A. 2d 187 (1943).

usually phrased in terms of minimum area "per family housed," in commercial and industrial districts they apply only to those lots which are used for dwelling purposes in whole or in part. Only a few Allegheny County ordinances add to the minimum area requirements by specifying minimum lengths and widths. As far as residential districts are concerned, out of 20 ordinances only four set minimum widths and two set minimum lengths. As to commercial districts only two ordinances have a minimum width and length requirement, and no minimum length and width measures were provided in industrial districts in any ordinance.

However, this absence of minimum length and width requirements is largely taken care of by ordinance provisions common in Allegheny County which specify required depths of yards. All 20 ordinances in the sample fixed a front yard depth for residential districts. Eighteen fixed side yard minimum depths and 16 dealt with rear yards. In commercial districts about $\frac{1}{3}$ of the ordinances fix minimum yard depths, but those that require rear yards do not apply them to properties in commercial districts on which there are no families housed. In industrial districts the three or four ordinances which specify yard depths state that they are applicable only in connection with dwelling uses in industrial districts.

In general, set-back lines for determining front yard depths should be stated in terms of absolute feet measurements. Several ordinances in Allegheny County have provisions which state that the set-back lines of a newly built structure shall conform to the set-back line established by the majority of a specified percentage of buildings already existing in the block. Such provisions are generally invalid. They are discussed in detail in Section C of Chapter XIV.

Another more recent method of insuring that a healthful and safe amount of open space is provided in our built-up communities is to specify the percentage of space which must be left open on lots. Two municipalities, MUNHALL⁴⁴ and NORTH VER-SAILLES Township,⁴⁵ apply such a percentage requirement to resi-

⁴⁴ Ordinance No. 960, January 13, 1942, as amended; Recorder of Deeds Book No. 3, p. 135.

⁴⁵ Ordinance No. 170, September 29, 1941, as amended; Recorder of Deeds Book No. 3, p. 561.

dential districts. PENN Township⁴⁶ applies the percentage-of-open-space requirement to its commercial district.

Another approach commonly employed in commercial districts is to allow inner or outer courts of certain minimum sizes in lieu of front or side yards.

2. *Area Exceptions*

Almost universally in Allegheny County as well as elsewhere, zoning ordinances mention particular architectural features which may be considered exceptions to the area requirements. On the other hand some ordinances mention these features in order to point out that they shall not be allowed as exceptions to diminish the areas of open space required by the general provisions. Again the important factor is the scope of the subject matter which the ordinance covers. Express mention should be made of such architectural features as terraces, covered porches, open porches, bay windows, fire escapes, and other lateral projections.

An area exception contained in nine out of the 20 ordinances studied is one exemplified by section 20 of EDGEWOOD'S ordinance:

"Nothing in the area district requirements of this ordinance relating to lot area per family shall be held to prohibit the erection of a one-family dwelling, the area of which is less than prescribed as the lot area per family, provided such lot at the time of the passage of this ordinance was held under a separate ownership from the adjoining lots, or provided that at the time of the passage of this ordinance a recorded plan of lots or subdivision of property showed such lot to be a separate and distinct numbered lot."⁴⁷

This provision is a reasonable exception which removes from the area requirements those lots which, at the time of the enactment of the ordinance, were too small to conform them.

F. Off-Street Parking Requirements

Closely allied with area requirements are provisions which make

⁴⁶ Ordinance No. 370, January 25, 1940, as amended; Recorder of Deeds Book No. 2, p. 324.

⁴⁷ Ordinance No. 412, April 6, 1925; as amended by Ordinance No. 609, May 27, 1949; Recorder of Deeds Book No. 3, p. 115.

mandatory the retention of open space on lots for the use of parking motor vehicles. By such a requirement a zoning ordinance can serve as a valuable adjunct to other methods used by the community to solve the ever-increasing present-day problem of traffic and parking congestion on the streets.

Off-street parking requirements have been recognized in at least four zoning codes in Allegheny County, and also in the zoning code which is at this time being proposed for adoption by the City of Pittsburgh. An amendment to the zoning code of PENN Township⁴⁸ in its preamble suggests an investigation of the sufficiency of off-street parking when a change of residential area to a business area is contemplated. However this same ordinance does not set up any specific off-street parking requirements. The zoning code of the City of CLAIRTON⁴⁹ does set up off-street parking requirements, fixing the parking space size as 10'×20' when used in connection with dwellings, and 8'×18' when used in connection with other structures. For public assembly buildings, the CLAIRTON ordinance requires one such space for each ten seats contained in the building. In the case of commercial buildings the requirement is one parking space for each 500 square feet of building floor area or one space for every three employees, whichever formula demands the greater number of parking spaces. ROSS Township⁵⁰ in 1950 amended its zoning ordinance to add off-street parking requirements which demand that in the future one parking space per family shall be provided in connection with the erection of multiple dwellings in classes A and B. An amendment to the zoning code of the Borough of EDGEWOOD⁵¹ provides also that off-street parking areas shall be left open on lots on which multiple dwellings are erected in the future.

The proposed zoning code drafted by the City Planning Commission of Pittsburgh in consultation with community experts, in section 1901 would require in connection with future construction

⁴⁸ Ordinance No. 541, September 11, 1950, Recorder of Deeds Book No. 1, p. 516.

⁴⁹ Ordinance No. 735, Recorder of Deeds Book No. 1, p. 529.

⁵⁰ Ordinance No. 481, November 20, 1950, Ordinance Book No. 8, p. 165, Recorder of Deeds Book No. 1, p. 476.

⁵¹ Ordinance No. 609, May 27, 1949, Recorder of Deeds Book No. 3, p. 115.

parking spaces stated in terms of total square feet. The Pittsburgh ordinance provisions would apply to virtually all uses.

No motorist needs to be convinced that a huge problem exists with regard to parking arising from the intensified use of automobile transportation. A paper written Mr. E. C. Yokley, City Attorney of Nashville, entitled, "Zoning Attacks on Traffic Congestion" advocates the use of off-street parking requirements in order to protect against traffic congestion in our growing suburban shopping centers. Although few cities have enacted zoning controls for parking in downtown shopping centers in time to prevent extreme traffic congestion in those areas, there is yet time to permit the effective use of such regulations in connection with the suburban commercial areas which are rapidly growing as the use of the automobile itself has permitted a degree of decentralization of urban areas. Today off-street parking requirements are being employed by Dearborn, Michigan; Phoenix, Arizona; Los Angeles, California; Atlanta, Georgia; and Washington, D. C., to name only a few cities. Mr. Yokley in his paper points out that the more common provisions require one car space for a single family dwelling and two for a two family unit. In the case of multiple family dwellings a common provision requires one space for each of not less than 75% of the number of dwelling units. A suggested requirement for hotels is 81 square feet per sleeping room. Hospital requirements vary greatly. The requirements imposed in connection with theatres may be based upon a relationship to the floor area of the building or upon the number of seats contained in the assembly building. Mr. Yokley recommends one car space for each four or five seats contained in an auditorium. Nashville, Tennessee, Mr. Yokley's own city, requires in the case of office buildings six car spaces for the first 2000 square feet of floor area plus one car space for each additional 1000 square feet.

Attorney Yokley emphatically urges that off-street parking requirements should not be made to operate retroactively but he does encourage provisions which will prevent extension of non-conforming uses. He mentions the ordinance of Detroit, Michigan, which contains a provision relating to the abatement of non-conforming uses but argues against such drastic steps because of the

danger that they would cause a loss of the support of public opinion, a support which is necessary to the truly effective operation of zoning ordinances.

G. District Height Regulations

1. *Maximum Heights*

A majority of the ordinances studied set maximum heights for buildings, especially in residential districts. Among the 20 ordinances examined there were 13 that imposed maximum height measurements in residential districts, 10 in commercial districts, and 2 in industrial districts. Such maximum heights are stated either in terms of numbers of stories or in feet or both.

2. *Height Exceptions*

As has already been pointed out in connection with the discussion of definitions, the application of the maximum height requirements to various types of architecture should be made clear. This can be done by means of a definition or it can be done by excepting certain vertical projections from the height requirements. Besides the four different types of roofs which should be considered (flat, gambrel, mansard, and gabled), provisions relating to heights should also expressly provide how matters like spires, domes, chimneys, ventilators, water coolers, water tanks, and skylights are to be dealt with. In the main the Allegheny County ordinance provisions are not detailed enough to define clearly these matters.

H. Airport Zoning

This study has already pointed out that there exists in Allegheny County no airport zoning ordinances enacted under the Airport Zoning Act of 1945. Allegheny County, as a heavily populated metropolitan area and a hub of transportation, today has two large airports and several small ones. With greater expansion of air transportation in the future, the increased air traffic will intensify the need for airport approach control.

How great is the need for the control of the height of structures adjoining airport boundaries in Allegheny County? The County of Allegheny provides an interesting case study in this respect because of its hilly topography. Where airports have been erected on

the top of raised hills or plateaus, as is the case with the Allegheny County airport, the problem of height hazards adjacent to the airport boundaries is partially solved by the circumstance that the structures do not present an obstruction to landing aircraft until their height reaches up to a level equal to that of the airport runway level. However, even though Allegheny County's two major airports are both erected upon ground higher than most of the surrounding territory, the need for careful consideration of the use of the airport zoning regulations remains. In the last twenty years, with the advent of heavier, faster and "hotter" aircraft, the angle of aircraft landing glide paths, which in the days of light planes was a relatively steep downward angle, has become one more nearly parallel to the surface of the earth. The same change has of course also occurred with respect to the take-off angle of aircraft. This change in the nature of air transportation has in reality extended the hazard area surrounding airports because modern aircraft must necessarily both in landing and take-off be at a low altitude a greater distance from the airport than was formerly the case. If jet powered aircraft become commonly used in air transportation, and the likelihood is that they will, the problems mentioned here will be further intensified. Also technological advances in blind landing procedures have brought instrument landings and take-offs into everyday use, another factor making approach hazard control necessary.

The problem has significance beyond the mere question of subsidization of our air transportation system. Because large airports are often municipal projects, virtually all citizens have an economic interest in the preservation of their usefulness. Furthermore airport approach control is also intended for the protection of neighboring areas as well as for the protection of air transportation itself.

Mr. Charles S. Rhyne in his 1944 book *Airports and the Courts* has enumerated ten ways in which government may control airport approaches. They are listed as follows:

1. Voluntary action by property owners. This course naturally cannot be depended upon to bring about a complete solution.
2. Purchase of all land near the airport. This course would in most cases be prohibitively expensive.

3. Purchase of air space rights. Because the air space over a piece of real property is itself real estate, the rights to passage through that air space can be bought and sold.
4. Acquisition of land by eminent domain. The drastic power of eminent domain should be employed only when there is no other reasonable method.
5. Acquisition of air space rights by eminent domain.
6. Abatement of height hazards as nuisances. This procedure should of course be avoided wherever possible because it operates more harshly upon property owners who at the time they erected their structures were not forewarned that in the future such structures would constitute nuisances with regard to the use of airports. The exercise of the nuisance abatement procedures would involve a great deal of litigation and would in many cases be of doubtful legality and worth.
7. Use by the Federal Government of its "commerce power".
8. Use by the Federal Government of its "war power".
9. Use by the Federal Government of its "postal power".
10. Airport zoning.

Of all these solutions, airport zoning presents the best answer, provided that it is employed before the area surrounding the airport becomes heavily built up. The use of airport zoning ordinances elsewhere in the nation is not uncommon. The earliest ordinances regulated the height of structures only within 1000 feet of the airport boundary but, because of the extending perimeter of the hazard area which has accompanied today's technological developments, present regulations such as those of Philadelphia restrict the height of all buildings within 10,000 feet of the airport boundary. Some ordinances have attempted to make the height limitations conform to the landing and take-off angle by describing a constantly varying height line which increases as the distance from the airport boundary increases.

Airport zoning, like general zoning regulations, is more effective when employed in time. Zoning of a hazard area before structures have been erected upon it protects that area from more drastic governmental action in the future. Judiciously employed, airport zoning can permit the optimum in the economic value of the land to be retained. But airport zoning regulations, Mr. Rhyne's book urges, should not be applied retroactively. The use of foresight

will prevent the need either for retroactive operation of zoning ordinances or for harsh nuisance abatement action of existing obstructions.

The airports of today are often so large that, as in Allegheny County, they are bordered by more than one municipality. This factor has been recognized by the Pennsylvania legislature; the Airport Zoning Act of 1945 sets up the means for joint enactment and joint administration of airport zoning regulations by two or more municipalities. Preferably however, airport zoning should be a problem undertaken by county authorities in Pennsylvania. The advisability of the county government taking the initiative in zoning problems is discussed in Chapter XVI hereafter.

I. Non-Conforming Uses

One of the most important legal aspects of a zoning ordinance is the extent to which it applies or does not apply to pre-existing uses which fail to comply with use requirements imposed by ordinances subsequently enacted. All zoning ordinances in Allegheny County contain an article or section dealing with nonconforming uses in general. However, in none of the municipalities outside Pittsburgh are these nonconforming use provisions sufficiently broad in scope to cover explicitly all the variant situations. Because of the legal considerations which control nonconforming use provisions, they are discussed in detail in Chapter XIV at Section E.

J. Legislative Provisions

Always important in the study of statutes or ordinances from the legal viewpoint are those provisions which, although they do not impose substantive regulations, are nevertheless important because they deal with the legal operation and interpretation of the law.

1. *Interpretation of Ordinance; Conflict with Other Laws*

All 20 ordinances studied contain a section labeled "Interpretation." Although these sections are most often as a matter of format placed with the administrative provisions of the ordinance, they may be more appropriately classed as legislative provisions.

The local ordinances commonly put under the "interpretation"

heading a clause defining how the ordinance shall apply to structures for which a building permit has already been issued before the enactment of the zoning ordinance, buildings on which the construction is not completed at the time the ordinance is passed. As a matter of form these particular provisions more properly may be classed as dealing with nonconforming uses and will be discussed in detail in Chapter XIV as part of that subject.

The other clause commonly classed under "interpretation" in local zoning codes is one which deals with the conflict of the zoning ordinance with other ordinances or statutes. This provision is merely a restatement of the statutory provision contained in some of the enabling acts; adopted by 16 of the 20 municipalities, most of them boroughs (the provision is not contained in the statute applicable to boroughs), this provision states that whenever the zoning ordinance imposes more strict requirements than other laws, it shall govern; but when the other laws impose the more strict requirements, the zoning ordinance shall be subject to them.

2. Separability of Invalid Provisions

Nineteen of the 20 sample ordinances contain a provision that if any one section is held invalid by the courts, the remaining sections shall be permitted to have effect. This sort of provision is a declaration of legislative intention to the effect that when a provision is held invalid, the enacting body deems it not to be essential to the continued validity of the ordinance as a whole. Such declarations will be given effect by the courts as far as possible. However, when the invalidity of one section makes meaningless certain other remaining sections of the ordinance, these other valid sections will fall also, because of their connection in sense with the invalid section.

3. Amendment of the Ordinance

Eighteen of the 20 ordinances contain provisions describing the amendment procedure which must be followed by the legislative body. This is another case where the ordinances simply restate procedures which the legislative bodies in any event are required to follow by the enabling statutes. These ordinance provisions state,

as the statutes do, that whenever 20% of the affected property owners protest, a higher vote is required in the legislative body in order to enact the amendment.

If at any time in the future the state legislature should amend the statutory procedure prescribed for ordinance amendment, these ordinance provisions would automatically become invalid insofar as they conflict with the changed statutory requirement.

4. Repealer

In 14 out of 20 basic zoning codes in Allegheny County there is a section repealing all previous zoning ordinances or at least repealing all previously enacted ordinances which are inconsistent. Of course, where such a provision is not expressly stated in the ordinance, the judicial doctrines of implied repeal will apply whenever the terms of a latter ordinance are inconsistent with the terms of an earlier ordinance.

5. Exemption of Public Utilities

Not mentioned in Chapter IX, in the description of enabling statutes there, was the statutory provision applying to boroughs and townships which states that zoning ordinances cannot operate upon buildings of public utility corporations if the Public Utility Commission decides after a hearing that the nonconforming situation of the utilities' building is reasonably necessary for the convenience or welfare of the public.

A few zoning ordinances in Allegheny County restate this statutory rule.

CHAPTER XIII

CLARITY AND FORM OF ZONING CODES

A. Clarity; Judicial Definition of Words

The lesser significance of form and organization in zoning codes as compared to building codes has already been mentioned. Perhaps, however, format is less significant in the case of zoning codes not because it is less important but only because it does not present as stiff a problem. In the organization of zoning codes there are fewer unlike units to be dealt with. On the other hand, the problem of finding exact single words is a greater one in zoning legislation.

As in cases involving building codes, the courts impose clarity as one of the requisites of valid zoning codes. The Court of Common Pleas of Allegheny County in *Edmundson v. Johns*,⁵² said:

"A zoning ordinance tends to limit the uses to which owners of real estate may devote their premises. Since it limits the common law rights of owners and occupiers of real estate, it should be clear and unambiguous, so as to provide a proper guide for person seeking to use property which is in their ownership or possession."

In the substantive provisions of a building code most of the technical words are drawn from scientific and engineering terminology; if the code is drawn up by architects or engineers, the scientific phrases will usually be employed in an accurate sense. However, in zoning ordinances, creatures of government rather than engineering, a much larger proportion of the phrasing involves words which are judicially defined, words like "nonconforming uses," "street lines," "offensive enterprises," "accessory uses," "hazards."

In Section A of the preceding chapter of this report, the importance of including a "Definitions" section or article in the zoning ordinance and the manner in which a court defined the word "garage" have been discussed. Section B of that chapter mentioned the judicial definition of "accessory uses." In section D of Chapter XIV the exact legal meaning of the phrase "existing nonconform-

⁵² 89 Pitts. L. J. 215, at 221 (Pa. 1941).

ing use" is explained. One more example here will suffice to point out the importance of the content of single words or phrases.

Of course, the first time a court deals with a phrase, it strives to determine what meaning those who used the phrase intended that it should have. Thereafter, the judicial definition tends to crystallize and in later adjudications involving the same phrase the courts will not take a fresh approach but will rely on the meaning attached by the previous court. This technique is aptly illustrated by two cases handled by the same court, dealing with the zoning ordinance of the Township of Whitemarsh in Montgomery County, Pa.

Whitemarsh's ordinance barred from the industrial zone a number of specifically-prohibited uses and also excluded:

"Any use which may be so noxious or offensive, by reason of the emission of odor, dust, fumes, smoke, gas, vibration, light or noise as to constitute a nuisance, *or any use which may be so dangerous as to constitute a public hazard.*"

In the first case dealing with this section, *Township of Whitemarsh v. Chemical Concentrates Corp.*,⁵³ the Common Pleas Court of Montgomery County said:

"We have not been able to find among the reported cases in Pennsylvania, a judicial definition of a public hazard nor has any such case been called to our attention. The words 'public hazard' are used in the ordinance to describe a use prohibited in the industrial zone. . . . It is a matter of common knowledge and judicial declaration that a certain amount of noise, dust, smoke, odors, vapors, etc., are a necessary and unavoidable concomitant with many industrial enterprises, and those who reside in or near industrial areas or zones must accommodate themselves. . . . Those who framed and adopted the Whitemarsh zoning ordinance must have known these facts and used the words 'public hazard' not as something which is a private or public nuisance, but to designate something which is a real, substantial and serious menace to the public health or safety."⁵⁴

Two years later the same court was asked to review a decision of the Whitemarsh Board of Adjustment which, on the narrow

⁵³ 62 Montg. 258 (Pa. 1946).

⁵⁴ 62 Montg. at 262.

"public hazard" grounds, refused a permit for the erection of a truck terminal in the industrial district. In that case, *Tornetta v. Township of Whitmarsh*,⁵⁵ the court repeated the interpretation which it had given the phrase in the previous case and then said:

"Since the words 'public hazard' are still used in the ordinance, we may assume the Whitmarsh authorities did not differ with our interpretation."⁵⁶

The court then proceeded to elaborate upon the previous definition. Relying on the rule of construction that the meaning of a general expression in a statute is restricted to things similar to those enumerated in the language preceding the general expression, the court then pointed out that all the industries which the ordinance specifically prohibited were enterprises which "might well be hazardous under any circumstances, in any locality, no matter what precautions were taken," industries such as poison manufacture, fireworks or explosive manufacture, and acid manufacture. "A public hazard," the court said, "is something more than a nuisance; it is a real, substantial, and serious menace. . . ."

In view of this definition the court proceeded to hold that a truck terminal would not so increase vehicular traffic as to create a serious hazard where none had existed before.

These cases demonstrate that the courts will take great pains to clarify a vague expression in an ordinance if clarification is possible. Ordinarily the judiciary will do a good job of rectifying the omissions and carelessness of the legislators. But the most serious fault of judicial definition is that such a definition is necessarily presented after a dispute has arisen, after municipal authorities and property owners have become embroiled in a litigation wasteful of time and energy. As far as possible, every phrase which does not in itself contain a widely-understood meaning should be defined in the "Definitions" article of the zoning ordinance.

In addition, an organizational device is here suggested in order to make the "Definitions" section or article more effective and more usable. The definitions of words used in the substantive provisions of the ordinance cannot always be placed in the same

⁵⁵ 67 D. & C. 591 (Pa. 1948).

⁵⁶ 67 D. & C. at 595.

place where the words are actually used; they must often be set off in a separate list to avoid cluttering up the ordinance enormously. But if the words and phrases enumerated in the definitions sections are numbered, and if every time those words or phrases are used in the substantive text they are accompanied by a reference number⁵⁷ corresponding to their number in the definitions sections, the full meaning will be called to the attention of the citizen examining the ordinance to determine his rights and duties.

B. Organizational Problems

There are other organizational problems of broader scope. The first Part of this report dealt variously with the interrelation of substance and form in building codes. The same effect appears in the formulation of zoning codes; the form used will depend to a great extent on the substantive approach.

1. *Separately-designated Use, Height, and Area Districts*

Whether or not a zoning ordinance must designate two or three separate *sets* of districts with varying boundaries for the presentation of use, height, and area requirements depends largely upon the physical state of the community existing at the time the ordinance is taken up. Wherever possible the ordinance should present only one set of districts so that within each division of the set the same use, area and height regulations apply throughout. Because area and height factors are closely related to use, the one set of districts based on use should ordinarily accommodate all three factors, at least in communities where the pattern of development has not yet crystallized.

Certainly where the ordinance makes the use, area and height districts coterminous, the three factors should not be designated as separate districts. Mentioned in the preceding chapter were BEN AVON, WILKINSBURG, EDGEWOOD, and GLASSPORT, all of which designate use and area districts separately although the boundaries of both sets are apparently coterminous.

The reasons behind these suggestions are simple ones. If the drafters can possibly place all the use, area, and height regulations

⁵⁷ Like the reference number which leads to this footnote.

pertaining to one location in the same position in the ordinance, then a casual or inexperienced reading of the ordinance becomes more likely to convey its complete import.

Of course, where a definite pattern of development already exists before zoning is considered, all regulations should not be forced into the same set of districts merely to improve the format of the ordinance. Before zoning is instituted, the actual districts in which yard areas are similar may not be coterminous with the districts in which uses are alike. For example, although one neighborhood may contain building set-backs about equal, the same neighborhood may be predominantly residential on the west end and predominantly commercial on the eastern end; because the planning effect of zoning is limited by the previously-existing state of affairs, if such a neighborhood were zoned as one district under regulations which required approximately the same set-backs and which required all future uses to be residential, a consistent over-all effect could not be achieved. A wiser result could be achieved by zoning the entire neighborhood as one area district, and putting its residential portion in one use district and its commercial portion in another.

When such conflicts are present, the final decision of the number of different sets of districts must depend on a survey of the actual situation. In semi-developed communities, zoning should preserve and direct the existing pattern, not attempt to superimpose conflicting regulations on top of it. In the face of such considerations, format must be relegated to a place of secondary importance. If two or three separate sets of districts are necessary, they should be employed even if one result is to make the form of the written ordinance more complicated.

2. *Misplaced Ordinance Provisions*

The form and understandability of zoning ordinances can be improved by careful placing of supplementary provisions.

Many ordinances in Allegheny County set off "Use Exceptions" in separate sections in the article or chapter relating to uses, and some even place them in separate chapters. Only those special uses which require the approval of the board of adjustment—such

as major garages, repair shops, and filling stations—are true exceptions. Matters such as fences (of limited styles) or nameplates, which are commonly set forth as exceptions to residential use regulations, should be included among the permitted uses.

Already discussed in Chapter XII have been the sections in some Allegheny County ordinances which explain the boundaries of districts. In the ordinances of BRENTWOOD,⁵⁸ BEN AVON,⁵⁹ AVALON,⁶⁰ and EMSWORTH,⁶¹ these provisions are placed in the article dealing with Administration, perhaps on the reasonable ground that they provide a guide for the Administrators in interpreting the district classification sections. However, the format of the ordinance should be designed primarily for the convenience of the citizens who must act within it, who have less opportunity than the administrators to become fully acquainted with all the provisions; hence these boundary explanation sections more appropriately could be placed with the district classification provisions, which ordinarily immediately precede the district regulations.

Already discussed also have been the provisions which state that buildings for which permits have already been granted at the time of the passage of the ordinance may be built as planned even if they do not conform, provided that, if the permit has been issued within the 60 days preceding the passage of the ordinance, contracts must have been let or actual construction begun. These sections, usually placed under the heading of "Interpretation" in the article dealing with administration, should be placed in the article dealing with non-conforming uses with a section heading of their own.

C. Means of Reference

1. Maps

In zoning codes the central means of reference is the zoning map, upon which the use, height, and area districts and other information may be graphically indicated. The zoning enabling statutes did not require a map or plan to accompany a zoning ordinance, but the Act of 1949 which required the submission of

⁵⁸ Ordinance No. 261, June 13, 1929; Recorder of Deeds Book No. 2, p. 267.

⁵⁹ Ordinance No. 359, Oct. 24, 1924; Recorder of Deeds Book No. 3, p. 28.

⁶⁰ Ordinance No. 763, August 2, 1940; Recorder of Deeds Book No. 2, p. 64.

⁶¹ Ordinance No. 416, May 11, 1925; Recorder of Deeds Book No. 1, p. 129.

zoning ordinances to the Recorder of Deeds has added the requirement that the zoning ordinance be submitted:

"... together with a map or plan of the political subdivision or part thereof clearly delineating the affected areas or zones with a brief statement of the type or kind of restriction or regulation for each area or zone."⁶²

The maps should be very carefully drawn up because many persons will be prone to rely entirely upon the map rather than upon the ordinance text for determining district boundaries. A few of the maps which have been submitted to the Allegheny County Recorder of Deeds' office contain minor inaccuracies; for instance, the ordinance of CASTLE SHANNON states that the property of the Pennsylvania Builders' Supply Company is part of the industrial district, but that property is not so marked on the map.

Many of the maps accompanying Allegheny County zoning ordinances are too small in scale. For easy readability the map should be drawn on a fairly large scale.

2. *Indexes and Tables of Contents*

In zoning ordinances the importance of indexes and tables of contents is much diminished in comparison with the pressing need for the use of these devices in connection with building codes.

An index for a zoning code would be very difficult to devise; it is by no means a necessity for the zoning code of a municipality smaller than a city. On the other hand, a table of contents is always a welcome aid because it shows at a glance the scope of the ordinance form and the amount of research and reading in the ordinance which a landowner must do in order to assure himself that he is fully apprised of all the regulations and restrictions affecting his own situation.

In Allegheny County, the ordinances of PENN TOWNSHIP⁶³ and NORTH VERSAILLES⁶⁴ township have tables of contents, two out of the twenty examined in detail. All zoning ordinances should be provided with tables of contents.

⁶² Act of May 14, 1949, P. L. 1340, § 1; 53 P. S. 261.

⁶³ Ordinance No. 370, Jan. 25, 1940; Recorder of Deeds Book No. 2, p. 324.

⁶⁴ Ordinance No. 170, Sept. 29, 1941; Recorder of Deeds Book No. 3, p. 561.

D. Amendments

Frequently amendments will have the same cluttering-up effect on the form of zoning codes as has been discussed with regard to building codes. If a zoning amendment changes a boundary line, it effects a radical change of all the regulations affecting property which thereby is moved from one use district to another. Therefore the zoning code amendments should be recodified periodically.

In Allegheny County at least six municipalities, five of them among the 20 studied by the Project, have codified their amendments to some extent.

As recorded in the county office, CASTLE SHANNON'S⁶⁵ ordinance incorporates the amendments in the original ordinance, as has OSBORNE'S⁶⁶ ordinance, which is recodified in the published form also. The zoning codes of MT. LEBANON,⁶⁷ DORMONT,⁶⁸ and EDGEWOOD⁶⁹ have been codified and also provided with a summary of certain regulations. The recorded form of EDGEWORTH'S⁷⁰ code contains a digest of regulations also.

⁶⁵ Ordinance No. 116, April 10, 1928, as amended to 1938; Recorder of Deeds Book No. 1, p. 218.

⁶⁶ Ordinance No. 124, May 24, 1927; Recorder of Deeds Book No. 1, p. 33

⁶⁷ Ordinance No. 594, May 24, 1926 as amended through Ordinance No. 1168, April 8, 1940; Recorder of Deeds Book No. 3, pp. 270, 281.

⁶⁸ Ordinance No. 651, Aug. 24, 1927 as amended; Recorder of Deeds Book No. 2, p. 152.

⁶⁹ Ordinance No. 412, April 6, 1925 as amended to 1938; Recorder of Deeds Book No. 3, p. 103.

⁷⁰ Ordinance No. 166, July 20, 1925, as amended to 1929; Recorder of Deeds Book No. 3, pp. 1, 7.

CHAPTER XIV

SALIENT LEGAL PROBLEMS IN ALLEGHENY COUNTY ZONING ORDINANCES

Note

Especially in recent years the courts have taken a more and more kindly attitude toward the exercise of zoning powers broad in scope. The cases have always held that zoning ordinances should receive a reasonable and fair construction in the light of their subject matter and in view of the manifest intention of the legislature.⁷¹ In general the courts purport to construe zoning powers liberally.⁷²

However, because the exercise of zoning powers represents a delegation of the state's police power, the courts require that zoning ordinances have a justifiable basis upon considerations of health, safety, morals, or the general welfare. The courts further require that zoning ordinances be reasonable in their application and uniform in their operation within each district.

A. Justifications

A justification in the form of some relation to the police power is indispensable to the validity of zoning ordinances. The courts have pointed out that the power of municipalities to enact and enforce zoning regulations is not unlimited and that they cannot be imposed unless they are substantially related to the public health, safety, morals or general welfare.⁷³

Besides the judicial rules, the enabling statutes themselves all contain a section outlining the purposes pursuant to which zoning ordinances shall be enacted. These sections mention as justifications the decreasing of road and highway congestion, fire and panic safety, health advancement through the provision of adequate light and air and the prevention of overcrowding, and the facilitation of

⁷¹ Appeal of Perrin, 305 Pa. 42, 156 Atl. 305 (1931); Appeal of Goodman, 305 Pa. 55, 156 Atl. 309 (1931).

⁷² In re Gilfillan's Permit, 291 Pa. 358, 140 Atl. 136 (1927).

⁷³ Borough of Prospect Park v. McClaskey, 151 Pa. Super. 467, 30 A. 2d 179 (1943); Appeal of Alloy Metal Wire Co., 29 Del. 488 (Pa. 1940).

adequate transportation, water, sewerage, schools, parks, "and other public requirements."

The legislature has also specified that the regulations shall be made "with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout" the municipality.

1. *Aesthetics*

Aesthetic considerations cannot serve as the sole basis for a zoning requirement. The limitation of the right to use one's own property freely cannot derive validity wholly from aesthetic or artistic purposes. However, aesthetics may be an incidental underlying purpose.⁷⁴ Beautification of the municipality may be considered in connection with the general welfare.

Occasionally the courts, with regard to the granting of variances and exceptions at least, have revealed that aesthetic considerations can bear considerable weight with them. In a case in which builders had sought from the board of adjustment permission to build an apartment in a single-family residential district, a common pleas court upheld the board's denial of the petition partly on the ground that the court had visited the area and had observed that the surrounding residences had attractive shrubbery and landscaping, the effect of which would be damaged by the erection of an apartment in the neighborhood.⁷⁵

Very clearly, however, the courts will not allow an argument based upon aesthetic grounds to impel them to modify zoning regulations which otherwise are valid as written. This fact was most vividly demonstrated in a case involving Pittsburgh's zoning ordinance, *Miller v. Seaman*.⁷⁶ The facts of this case are well known in the Pittsburgh district. Property situated at the corner of Penn and Homewood Avenues was so shaped and of such a small area that if the zoning ordinance's yard requirements were obeyed, the only buildable space left on the lot would be about 5½ feet wide in front, 10 feet wide in the rear and 55 feet deep.

⁷⁴ Appeal of Liggett, 291 Pa. 109, 139 Atl. 619 (1927).

⁷⁵ *Cline v. Nether Providence Township Board of Adjustment*, 33 Del. 293 (Pa. 1944).

⁷⁶ 137 Pa. Super. 24, 8 A. 2d 415 (1939).

The purchaser of the land applied to Pittsburgh's Bureau of Building Inspection for a building permit, supplying plans which described the intended residence to be a frame building one story high with widths and length equal to the dimensions of this small buildable space. Such a building $5\frac{1}{2}$ feet wide in front, 55 feet long and 10 feet wide in the rear, with a height of about 12 feet, would, especially because of its flat-roofed, frame construction, resemble a stable or a railroad car; and there is no doubt that it would clash aesthetically with the neighboring homes in that residential district.

The building permit was denied on the ground that a statute required all residences to be 40 feet wide in the front; however, that statute had previously been repealed. By the time the case between the city and the would-be builder had reached the superior court, neighboring property owners had intervened. The superior court pointed out that at that stage of litigation the builder and the city appeared willing to enter into a compromise, but the intervenors insisted on their legal rights. The court found that their legal rights depended on the zoning ordinance alone and ordered the issuance of a building permit for the strange construction. Arguments based upon aesthetic considerations outside the zoning ordinance were of no avail.

2. *Economic Values; Minimum Cost and Minimum Floor Area Requirements*

Contrary to popular belief a zoning ordinance cannot require that all the dwellings constructed in a particular residential neighborhood equal or surpass a minimum cost. Setting a minimum cost in building or zoning ordinances has seldom been attempted. Where it has been tried, it has been held invalid because the intention behind such a requirement seems to be largely one derived from aesthetics or from a desire to protect the economic values of existing properties. The Borough of Speers in Washington County, Pennsylvania, attempted to impose such a requirement but was rebuffed by the common pleas court, which said:

"... We have not found a single case which sustains a regulation that a dwelling house must cost at least a certain sum.

This would appear to be rather a means of social exclusion than for the purpose of promoting health, safety, morals or the general welfare.⁷⁷

It is doubtful if a court would sustain even a very low minimum cost set for the purpose of eliminating shanties. The structural and fire safety aspects of a single structure can more adequately and accurately be handled by the building code.

May the protection of existing property values be a justification for a zoning ordinance requirement? The minimum cost requirement discussed above is an illustration of the kind of requirement which may be attempted not only for aesthetic purposes but also in order to insure that existing property values in a neighborhood will not be depreciated by new, less expensive dwellings. Another sort of requirement has been attempted which derives most of its basis from the purpose of protecting economic values. This requirement has in some ordinances, including two in Allegheny County, been phrased in terms demanding a minimum interior first floor area in new construction of dwelling houses.

Several cases in Pennsylvania have dealt with this kind of requirement. A 1950 common pleas decision, *American Veterans Housing Cooperative, Incorporated v. Zoning Board*,⁷⁸ dealt with a zoning ordinance in Montgomery County which provided a sliding scale of minimum interior floor area requirements which varied in different districts of the municipality. The court in this case based its decision largely upon other matters but did examine the minimum floor area requirement in passing. The opinion stated that probably a municipality could require a reasonable minimum of habitable floor area in all dwellings but that it was questionable whether different minimums could be prescribed for different districts if the minimum floor area requirements are allegedly based upon health considerations. The opinion cited two cases from the State of Michigan⁷⁹ which held that minimum interior floor area

⁷⁷ Appeal from Ordinance of Borough of Speers, 28 Wash. 220 at 227. (Pa. 1948).

⁷⁸ 69 D. & C. 449 (Pa. 1950).

⁷⁹ *Senefsky v. Huntington Woods*, 307 Mich. 728, 12 N. W. 2d 387 (1943); *Frischkorn Co. v. Township Building Inspector*, 315 Mich. 556, 24 N. W. 2d 209 (1946).

requirements and minimum interior cubic space requirements were invalid because not based upon a police power reason.

A more recent Pennsylvania case in the superior court has decided the question more directly. *Commonwealth v. McLaughlin*,⁸⁰ decided in 1951, dealt with a minimum first floor area requirement in the building code of Upper Darby Township, which required dwellings to have a minimum first floor area of 384 square feet. The superior court said that this provision was not an invalid one, that it was authorized by the provisions of the first class township law which relate to building codes, and that it was supported by health reasons. The superior court pointed out that ordinances and statutes in Pennsylvania which specify cubic air space requirements for rooms in tenement houses have been sustained for health reasons; hence this ordinance could be sustained upon the same basis because, if the ordinance states a minimum floor area requirement in square feet, the cubic air requirement is easily found by multiplying the minimum floor area figure by the average height of ceilings in dwellings.

Although this *McLaughlin* case deals with a building code section, the decision is probably applicable to minimum floor area requirements contained in zoning codes. Because the square feet requirement was relatively low, only 384 square feet, it appeared to the court to be eminently reasonable upon its face; a dwelling house which had fewer square feet than that would be a very small and cramped dwelling.

Low requirements such as those contained in the *McLaughlin* case appear to have a definite relation to health considerations. However a contrast is presented by two new ordinances in Allegheny County. These are two amendatory sections which have been added to the zoning codes of MOUNT LEBANON Township⁸¹ and FOX CHAPEL Borough.⁸² The MOUNT LEBANON amendment applies only to single family dwellings and requires a minimum first floor area of 1000 square feet for a one-story single family dwelling, 840 square feet for a one and one-half story dwelling and 616

⁸⁰ 168 Pa. Super. 442 (1951).

⁸¹ Ordinance No. 1535, July 9, 1951.

⁸² Ordinance No. 103, May 14, 1951; Recorder of Deeds Book No. 1, p. 533.

square feet for single family dwellings having two or more stories. The FOX CHAPEL ordinance is drafted in similar terms but uses higher figures, 1200 square feet in the case of a one-story building, 1000 square feet for a one and one-half story dwelling and 800 square feet where there are two or more stories. It would be difficult to prove definitely whether or not such requirements as these are closely related to health considerations. Housing codes and tenement house statutes which impose cubic air space requirements usually deal with rooms rather than with entire first floors. Health considerations are related to ventilation and lighting facilities; also they depend not only upon total area of the entire floor but also upon the size of each particular room and upon the number of occupants. These FOX CHAPEL and MOUNT LEBANON zoning requirements impose their minimum interior floor area restrictions without regard to the number of rooms and also without regard to any specific number of occupants. It is possible therefore that a reviewing court would find that these requirements are not reasonably related to health considerations.

As a matter of fact the intention behind the enactment of such restrictions probably is based as much upon a desire to maintain a high level of residential values as it is upon health considerations. These ordinances therefore may present in court a little different question from that presented by the Upper Darby building code requirement which specified an area of only 384 square feet. These Allegheny County requirements, which are equal to three times that figure, may have to depend upon the justification of protection of economic values rather than upon the justification of health alone.

In most of the zoning enabling statutes, including those applicable to townships and boroughs, the Pennsylvania legislature has stated that economic values may be taken into consideration; the statute sections say that zoning regulations may be made "with a view to conserving the value of buildings . . . throughout" the municipality. So long as health or morals considerations are present, the courts in the past have not required that the effect of zoning regulations be inevitably the enhancement of property values if a zoning ordinance is appropriate to the furtherance of health aims. The

fact that an ordinance incidentally may cause the depreciation of some property values does not invalidate it.⁸³

A new question is presented, however, by these minimum floor area requirements, the question of whether or not zoning ordinances may be based wholly or largely upon the desire to protect the property values of existing residences by insuring that the residences subsequently built will be of such size that their cost will be near to the cost of the previously existing buildings. Undeniably the imposition of a minimum interior floor area requirement is in some respects equivalent to the imposition of a minimum cost requirement, because fixing the size of first floors will fix a bottom limit of cost below which future dwellings cannot fall.

The statutory statement that zoning ordinances may depend upon property value justifications has not yet been thoroughly worked out in Pennsylvania court decisions. At present the question is in a state of flux. Advocates of this type of restriction could argue that the preservation of existing property values stands upon its own feet as an important factor in "the public welfare" aspect of the police power.

Nevertheless the use of requirements which have the effect of putting a floor under the cost of dwellings possibly in some circumstances could adversely affect the public welfare by eliminating low cost but adequate housing. Communities like MOUNT LEBANON and FOX CHAPEL, whose present construction meets high standards with regard to property values, can so far as their land is concerned argue that they are justified in attempting to forestall a depreciation of presently existing property improvements. However, should a great many municipalities in the county and state adopt minimum interior floor area requirements which operate to set a high bottom limit upon the cost of dwelling construction, many persons who could afford only low cost housing would be deprived of it.

And even if the courts uphold such a basis for zoning ordinances, a very practical planning consideration is involved. If individual municipalities set such limits upon dwelling construction within their own boundaries without regard to the total affect upon housing

⁸³ Appeal of Kerr, 294 Pa. 246, 144 Atl. 81 (1928).

throughout the county and the state, the public welfare may be hampered rather than helped. This consideration of property value protection is an especially good illustration of a matter which can more appropriately be handled by zoning and planning on a scale larger than that of a single municipality. If county-wide considerations were made a factor, those municipalities which at present have a justifiable fear of property depreciation might be able to fit their program into an overall county plan while other municipalities which at present have housing which is predominantly low cost in nature could be urged not to attempt to hoist the present character of their housing by the use of such requirements.

Whether or not the courts of Pennsylvania will uphold the requirements contained in the MOUNT LEBANON and FOX CHAPEL amendments is a question impossible to answer at this time. Although the Upper Darby building code requirements were upheld, the MOUNT LEBANON and FOX CHAPEL area requirements differ from those in degree at least. The courts ordinarily give local legislative bodies a wide area of discretion in determining the means by which police power problems can best be met. However, as previously stated, a court might be convinced that these Allegheny County ordinances whose interior floor area requirements run from 616 square feet to 1200 square feet, are not reasonably related to health considerations. Expert testimony might be adduced to show that no cubic foot space requirement or square foot space requirement can reasonably be related to health considerations unless it recognizes other pertinent factors such as the number of occupants, the number of rooms and the existence of lighting and ventilation facilities. These amendments could also be challenged on the ground that they create an unwarranted discrimination in dealing only with single family dwellings; if floor space requirements are essentially related to health then they should also be applied to all types of dwelling occupancies, using different figures if necessary. If health considerations are not the basis for such requirements, then in the future our courts may recognize that such requirements may stand upon the basis of economic values alone. Such a doctrine should be developed carefully and with a view to the over-all regional affect which the upholding of such

requirements would have upon the existence and availability of low cost housing to those families who cannot afford more.

B. Reasonableness

1. *In General*

As in the case of building codes and all other local ordinances, the courts impose the requirement of reasonableness, which is essentially a due-process-of-law constitutional requirement. Even though a zoning ordinance evidences that its aims are the proper ones of health, safety and general welfare, it is further required to employ reasonable and appropriate means of achieving those aims.

As a general rule the courts will not assume the full power of deciding themselves whether or not a zoning ordinance is reasonable. They will upset it only if it is clearly and arbitrarily unreasonable. A municipality may generally exclude from a residential district buildings devoted to business and trade of every sort. Hotels and apartment houses may be excluded from a district which is zoned for one- or two-family residences.⁸⁴ Although an outright prohibition of multi-family dwellings in some residential districts does not inevitably and necessarily mean that public health or safety will be promoted thereby, the courts permit such restrictions because they are not necessarily and inevitably unreasonable.

Similarly, outright prohibitions of row houses having party walls, such as that contained in the ordinance of SHALER Township,⁸⁵ would be upheld because they reasonably, though not necessarily, tend to reduce the extent of fire hazards.

Reasonableness, of course, is often a matter of degree. In *Kerr's Appeal*⁸⁶ set-back and yard requirements which applied to interior lots in a residential district so as to leave only 37% of the lot surface available for building were held to be operative because the property in question was located in a residential section. As a matter of dictum, however, the court in that same case pointed out⁸⁷

⁸⁴ *In re Jennings' Estate*, 330 Pa. 154, 198 Atl. 621 (1938).

⁸⁵ Ordinance No. 265, February 2, 1932, § 15; Recorder of Deeds Book No. 2, p. 190.

⁸⁶ 294 Pa. 246, 144 Atl. 81 (1928).

⁸⁷ 294 Pa. at 250.

that if the zoning ordinance effected such a result in a business district, it would not be permitted to operate.

2. *Non-Districted Prohibited Uses*

In Allegheny County the principal legal problem relating to the judicial requirement of reasonableness is posed by those ordinances which prohibit certain enterprises, not necessarily nuisances, from being carried on anywhere in the municipality rather than merely relegating them to an industrial district. These requirements are referred to here as non-districted use prohibitions. The ordinances of CASTLE SHANNON Borough,⁸⁸ MOUNT LEBANON Township,⁸⁹ NORTH VERSAILLES Township,⁹⁰ ROBINSON Township,⁹¹ and THORNBURG Borough⁹² all contain sections which prohibit certain uses from being carried on anywhere within the boundaries of the municipality. In the case of THORNBURG Borough, where the entire borough comprises one residential district, the original ordinance together with one of its amendments⁹³ now entirely prohibits manufacturing of any kind, warehouses, filling stations, commercial garages, cemeteries, and stores and mercantile establishments.

In addition to those ordinances which expressly exclude certain uses entirely from the municipality, there are a few other ordinances which permit in residential and commercial districts only certain named uses (thus excluding all uses not named), and then state that certain other uses are prohibited from the industrial district; hence the prohibited uses listed in connection with the industrial district are barred from the whole municipality with the same effect as if they were set forth expressly as being barred from the entire municipality. Examples of such ordinances are those of WILKINS-

⁸⁸ Ordinance No. 116, April 10, 1928, Art. 3, § 8; Recorder of Deeds Book No. 1, p. 218.

⁸⁹ Ordinance No. 594, May 24, 1926, Art. 3, § 8; Recorder of Deeds Book No. 3, p. 270.

⁹⁰ Ordinance No. 170, Sept. 29, 1941, following § 502; Recorder of Deeds Book No. 3, p. 561.

⁹¹ Ordinance of October 9, 1945, § 5; Recorder of Deeds Book No. 3, p. 10.

⁹² Ordinance No. 77, June 10, 1929, § 5; Recorder of Deeds Book No. 2, p. 233.

⁹³ Ordinance No. 109, June 18, 1945; Recorder of Deeds Book No. 2, p. 238.

BURG Borough,⁹⁴ SHALER Township⁹⁵ and EMSWORTH Borough.⁹⁶

Some ordinances like that of SHALER Township in Article 3, Section 5(44) wind up their list of prohibited uses by excluding

“... those uses which may be noxious or offensive by reason of the omission of odor, dust, smoke, gas, vibration or noise, which may be inconsistent with the primary use of property in this township as an essentially residence community.”

Such prohibitions of noxious or offensive businesses are expressly authorized by statutes whose constitutionality has not been challenged. In the case of boroughs the statutory provision allows them

“to prohibit, within the borough, the carrying on of any manufacture, art, trade or business which may be noxious or offensive to the inhabitants.”⁹⁷

On the other hand, where an enterprise is not innately offensive and does not constitute a nuisance, the validity of a blanket exclusion from the entire municipality has been cast into some doubt by a lower court case in Pennsylvania. In that case, *Appeal of Kanig*,⁹⁸ the Borough of Dunmore had refused a permit for the erection of a slaughterhouse because its zoning ordinance forbade abattoirs anywhere within the municipality. Common pleas court on appeal to it said, “So far as we are able to determine, the validity of the sections of zoning ordinances prohibiting a certain type of use within a zoned area have not been passed upon.” The court pointed out that in not one of the statutory grants of power “is there a statement that any use may be completely prohibited within the general limits of any municipality.” The court distinguished between ordinances which divide municipalities into districts and allocate all types of uses within those districts and the ordinance clauses which completely prohibit a legitimate industrial use. Then the court said:

⁹⁴ Ordinance No. 1089, June 20, 1929; Recorder of Deeds Book No. 2, p. 281.

⁹⁵ Ordinance No. 265, February 2, 1932; Recorder of Deeds Book No. 2, p. 190.

⁹⁶ Ordinance No. 416, May 11, 1925; Recorder of Deeds Book No. 1, p. 129.

⁹⁷ § 1202, Cl. XVI of the Borough Code as amended by the act of July 10, 1947, P. L. 1621, § 40.

⁹⁸ *Appeal of Kanig*, 56 D. & C. 53 (Pa. 1946).

"To put the case to its extreme possible application suppose that all of the zoning authorities throughout the Commonwealth would pass similar ordinances and prohibit establishment of slaughterhouses within their respective area, the result would be that no place in the Commonwealth would a local slaughterhouse be established as a new business venture and that a monopoly of the business would be granted to those established houses therein prior to the passage of such ordinances. It seems obvious that local slaughtering is a desirable and necessary business . . . it is likewise obvious that the idea of fixing the status of pre-existing business as an effectual monopoly is abhorrent. . . ."⁹⁹

The court said that hence Dunmore Borough's ordinance in this instance was unreasonable and confiscatory. The appellant was allowed to build his slaughterhouse.

The result of this case must not be taken as a binding rule, however. The court in the *Kanig* case, in addition to the general statements mentioned above, reported in great detail the precise factual situation surrounding establishment of the slaughterhouse in question. Apparently it was to be located in a sparsely settled section of the borough some distance from the nearest existing human habitations, and it was to be provided with sanitary facilities such as cesspools; moreover, the court pointed out that the nearest residents had no objection. All in all the case makes plain that the particular circumstances weighed heavily in the decision.

There is another lower court case in Pennsylvania which hints at a result opposite to that of the *Kanig* case. In *Borough of Lewisburg v. Baker*¹ a common pleas court allowed the conviction and fining of a person who violated an ordinance which prohibited the establishment of a junkyard anywhere within the borough. The court thus by implication upheld the validity of the ordinance. However, the court expressly said that it would not discuss the validity of the ordinance because it had not been questioned by the violator. The Borough Code² expressly allows boroughs "to regu-

⁹⁹ 56 D. & C. at p. 58.

¹ 39 Mun. 12 (Pa. 1947); affirmed, *Commonwealth v. Baker*, 160 Pa. Super. 640, 53 A. 2d 829 (1947).

² As amended by the act of July 10, 1947, P. L. 1621, § 40; 53 P. S. 13375.

late the establishment and maintenance of junkyards," but it does not expressly allow boroughs to prohibit junkyards entirely.

The most definitive and authoritative case dealing with this matter was handed down recently in the Pennsylvania Supreme Court, *Mutual Supply Company Appeal*.³ It dealt directly with the question of non-districted prohibited uses as it appeared in the zoning ordinance of UPPER ST. CLAIR Township in Allegheny County. In that case a coal company challenged the validity of the zoning ordinance because it made no provision for industrial uses of property within the township. The Pennsylvania Supreme Court said that such an exclusion was not of itself necessarily a legal defect; each such case will be examined separately upon its own facts with regard to the reasonableness of the requirement. The particular facts of this case should be noted here. The coal company challenged the ordinance because under it they could not within UPPER ST. CLAIR Township open an entrance to coal lying under the township. However the company did have access to the same vein of coal through an entry located in another municipality. Therefore although the UPPER ST. CLAIR ordinance barred the creation of such an entry within its borders, the coal company was not deprived of the value of its coal because the vein could be reached, although at more expense, from the entry in the adjoining municipality. Recognizing this consideration, the supreme court said that if the exclusion of industrial uses by the ordinance had conclusively prevented the coal company from removing its coal then a different question would be presented.

This case indicates that such blanket exclusions are not necessarily always valid or invalid. The courts will examine each new situation upon its own facts to determine whether or not the blanket exclusion is a reasonable one.

C. The Requirement of Uniformity

Closely interrelated with the judicial requirement that zoning ordinances employ reasonable methods is the further requirement that they be uniform and non-discriminatory. This requirement does not mean that regulations shall be uniform throughout the

³ 366 Pa. 424 (1951).

municipality but it does demand that the restrictions applicable to like subject matter shall be uniform within each district. The rule has been incorporated in all the enabling acts in the following form:

"All . . . regulations shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in another district."

1. *Discriminatory Use Regulations*

The Pennsylvania courts have said that a single lot is not a proper area to be classified as a zoning district in itself because such a classification will prevent the ordinance from bearing alike on all persons living in the same territory. The courts have prevented zoning ordinances from segregating a corner lot in a residential district into a commercial district.⁴

Similar situations appear in some Allegheny County ordinances. The zoning ordinance of Castle Shannon in section 8 of Article III, sets out the boundaries of a U-2 multiple dwelling district but specifically excepts the property of the Pennsylvania Builders' Supply Company, which is within those boundaries, from the district. Section 9 of the same article states that the property of the Pennsylvania Builders' Supply Company is included in the industrial district. Although this appears to be a discriminatory classification, it is not; because the Pennsylvania Builders' Supply property is just across the street from the generally-designated industrial district, this specific exemption of certain named property from the restrictions of the multiple dwelling residence district appears to be only an awkward way of setting out district boundaries.

However, CASTLE SHANNON'S ordinance violates the standard of uniformity in another respect. Section 10, in outlining the uses permitted in an industrial district, says:

"In this district the land may be used and buildings may be erected, altered or used for purposes or kindred purposes only as that for which it is used at the time of the passage of this ordinance and for the uses permitted in Districts U-1, U-2, and U-3.

"The property of Pennsylvania Builders' Supply Company is hereby excepted from the provisions of this section."

⁴ Huebner v. Philadelphia Savings Fund Soc., 127 Pa. Super. 28, 192 Atl. 139 (1937).

This section 10 is first open to objection on the ground of reasonableness discussed previously in this chapter because it attempts to freeze industrial uses at the status quo.

The section is poorly drafted and very vague. The meaning of the phrase "kindred purposes" is especially doubtful. Does the section limit the future use of *each* lot to purposes "kindred" to those for which the *same individual* lot was being used at the time of passage of the ordinance, or does it allow *any* lot to be used in the future for purposes "kindred" to those existing *anywhere* in the district (except the Pennsylvania Builders' Supply Property which expressly is not governed by the section) at the time of passage of the ordinance? The antecedent of the pronoun "it", in the phrase "for which it is used at the time of the passage of this ordinance," is probably the word "land". If a court upheld this section at all, it would probably construe the word "land" to mean "land anywhere in the district" and give the pronoun "it" the same content.⁵

Thus the section means that all property in CASTLE SHANNON'S industrial district, except the property of the Pennsylvania Builders' Supply Company, may be used in the future for purposes kindred to those existing anywhere in the district—except on the property of the Pennsylvania Builders' Supply Company—at the time of passage of the ordinance. Section 9 of article III, as amended, refers particularly to the use of the specifically-excepted property:

"The property of Pennsylvania Builders' Supply Co. is hereby included in this [Industrial] district and the land may be used and buildings may be erected . . . for the manufacture of concrete blocks, warehouses for the storage of materials, and bins for unloading materials from a railroad siding."

Although this section 9 says that the Builders' Supply Property is included in the industrial district, it is not included in the indus-

⁵ This section 10 is apparently modeled upon section 11, article III of MT. LEBANON'S ordinance, which would be subject to the same meaning; the MT. LEBANON provision further states that the industrial district shall consist only of the properties of the Duquesne Light Co. and the South Hills Ice Co. "and such extensions of said industries as may be made adjacent to and contiguous to said existing buildings."

trial district for any of the purposes of section 10 because that section expressly states that its provisions do not apply to the Builders' Supply property.

Even if section 8, mentioned earlier, specifically mentions the Pennsylvania Builders' Supply Company property only as a means of indicating boundaries, these sections 9 and 10 go much further. They remove that one property in the industrial district from the regulations applying to all other properties in the same district. Their effect is clearly discriminatory—whether to the advantage or disadvantage of the Pennsylvania Builders' Supply Company does not appear. The other properties may in the future be changed to purposes kindred to those existing anywhere in the district at the time of passage of the ordinance; but the Builders' Supply Company property is limited in both present and future to uses described specifically. If this property should change hands and if the new owner attempted to establish a use which was different although "kindred" to those elsewhere in the industrial district, the literal provisions of the ordinance would forbid such a change.

In any event the ordinance provisions limit one property to a specifically-named use. Because this use is probably satisfactory to the Builders' Supply Company, the ordinance has not been challenged; however, if a subsequent owner should challenge it, these provisions would be held unreasonable and discriminatory. They stand as examples of use limitations which should be avoided by those drafting zoning ordinances.

Another problem of discriminatory use regulations appears in SWISSVALE'S zoning ordinance⁶ which, at section 7, reads:

"A' RESIDENCE DISTRICT: In this district the land may be used and buildings or structures may be erected, altered, reconstructed and used only for the following:

1. One-family dwellings.
2. Duplex dwellings or apartments except in the Regent Square District where it will be permissible to build duplex dwelling or apartments on Braddock Avenue between Hutchinson Avenue and Saunders Street only.

⁶ Ordinance No. 830, August 17, 1925; Recorder of Deeds Book No. 3, p. 455.

3. Double House or Multiple Dwelling, except in the Regent Square District where it will be permissible to build double houses or multiple dwellings on Braddock Avenue between Hutchinson Avenue and Saunders Street only."

This section may violate the statutory requirement that "regulations shall be uniform for each class or kind of buildings throughout each district." In SWISSVALE'S ordinance the "Regent Square District" is not made a zoning district within the statutory meaning of a zoning district; the district being dealt with by this section is the "A" residence district. Even if it is assumed that the Regent Square District is a separate zoning district the regulations may be held discriminatory within it.

Every Allegheny County municipality which has a zoning ordinance should carefully examine its ordinance to ascertain whether or not it contains use regulations which are invalid for unreasonableness or lack of uniformity.

2. *Non-Uniform Set-Back Building Lines*

The Pennsylvania courts have imposed the requirement of uniformity also with respect to the set-back building lines prescribed within each district, provisions usually denominated in the ordinances as "front yard area requirements". In one case, the Pennsylvania Superior Court held invalid an ordinance which established set-back building lines for only two separated blocks in the business section of a borough, especially because the set-backs varied between those two blocks.⁷ A like question was presented in a lower court case.⁸ An ordinance required a 50 ft. set-back on one side of a street. The court held that such an ordinance would be invalid because it was discriminatory in dealing only with one side of the street, both sides of which were in the same zone.

In Allegheny County the zoning ordinance of the Borough of MUNHALL evidences a similar discrimination. In section 303 MUNHALL'S ordinance⁹ states that in the "A" residential dis-

⁷ Scholl v. Yeadon Borough, 148 Pa. Super. 601, 26 A. 2d 135 (1942).

⁸ Hamilton v. Lemoyne Borough, 73 D. & C. 406 (Pa. 1950).

⁹ Ordinance No. 960, Jan. 13, 1942; Recorder of Deeds Book No. 3, p. 135.

trict, the set-back shall be 40 feet "except that in the Munhall Farms plan of lots, 'Area A' of Munhall Farms, Inc., the set-back on Fairfield Avenue and Harvey Avenue between the Homestead Park Plan and the property of Earl and Fannie Lloyd shall be at least twenty-five (25) feet. . . ." This section might be held discriminatory because it imposes differing set-backs within the same district.

A more common discriminatory provision in Allegheny County is one which states that the set-back lines of future buildings shall conform to the line set by a majority of a certain percentage (usually 80%) of the buildings already existing in the same block.

The legal effect of such a provision was made plain when it was adjudicated in a leading case in 1926, *White's Appeal*,¹⁰ dealing with a section in Pittsburgh's zoning ordinance which read:

"Front yard: (a) There shall be a front yard having a depth of not less than fifteen feet.

"(b) When the front wall of eighty (80) per cent of all the buildings on one side of a street between two intersecting streets have been kept back from the street lines, no building hereafter erected, or altered, shall be placed nearer to the street line than the distance established by the majority of the eighty per cent at the time of the passage of this ordinance. . . ."

In holding this provision invalid for lack of uniformity, the Pennsylvania Supreme Court said:

" . . . the application of this ordinance is a gross discrimination in that it does not bear alike on all persons living within the same territory. Regulations which do not operate on all alike cannot be justified under the police power. Here it affects property differently on adjoining blocks, or within the same block on opposite sides of the street. . . . If there is only one building erected within a block . . . say, 100 feet from the street line, then all other buildings erected in the block, whether eighty per cent or more, would have to conform to this one. . . ."¹¹

Such a provision has no relation to public safety, health, morals or general welfare, the court said. The court might have added

¹⁰ 287 Pa. 259, 134 Atl. 409 (1926), affirming 85 Pa. Super. 509 (1925).

¹¹ 287 Pa. at 268.

that such a regulation would not even tend to advance the aesthetic effect but rather would operate to destroy it.

According to Mr. Lippincott of the City Planning Commission, after this decision the City of Pittsburgh set about immediately to amend its ordinances to absolute feet measures. Yet other municipalities in the county today still have similarly invalid provisions in their ordinances.

The ordinances of CASTLE SHANNON, EDGEWOOD, EMSWORTH, GLASSPORT, MOUNT LEBANON, PENN Township, and THORNBURG today all contain sections similar to that held invalid by *White's Appeal* in 1926.

CASTLE SHANNON'S provisions in section 3 of article III reads:

"All buildings . . . shall be constructed so that the front and side yard area shall conform to building lines as shown upon recorded plans or in deeds of record affecting said property and in case no such recorded building lines shall have been established, no building hereafter erected or altered shall be placed nearer the street line than the distance established by 80% of the buildings erected on said street at the time of the passage of this ordinance."

MOUNT LEBANON'S ordinance contains a like provision also in section 3 of article III. The MOUNT LEBANON section was litigated in *Valicenti's Appeal*,¹² but because that case dealt only with the portion of the section which makes building lines dependent on plans or deeds of record, the court did not expressly invalidate the entire section. The court said that *White's Appeal* was not applicable to the particular case before it because the municipal authorities were relying only on that portion of the section which fixed building lines as determined by plans recorded prior to the passage of the ordinance. That portion of this section was valid, the court said, because it applied to all property similarly situated. But then the court said:

"Had the attempt been made to fix the line as that existing at the time of the passage of the ordinance, in the case of 80% of the buildings then erected, a different conclusion might be

¹² 298 Pa. 276, 148 Atl. 308 (1929).

reached, but that proposition is not before us in the present proceedings."¹³

Thus those portions of the CASTLE SHANNON and MOUNT LEBANON sections which base building lines on a percentage of existing buildings still come within the condemnation of *White's Appeal*.

GLASSPORT'S ordinance¹⁴ in section 4 of article II is also invalid under *White's Appeal*, because it makes the building lines of new buildings dependent upon the mean building line established by previously existing buildings. The zoning code of EDGEWOOD Borough¹⁵ in section 16 uses a similarly invalid method of setting front yard depths in first area districts.

Sections 17 and 18 of EDGEWOOD'S ordinance, which apply to second and third area districts respectively, are a little different in that, in addition to the percentage provision, they also set a minimum set-back measure in feet. The ordinances of PENN Township,¹⁶ EMSWORTH¹⁷ and THORNBURG¹⁸ Boroughs also use the percentage provision with a minimum absolute set-back in addition. Insofar as these sections make building lines dependent upon those already set by a percentage of the previously existing buildings, they, too, are invalid. It will be noted that in *White's Appeal* the percentage provision was also inserted in conjunction with a 15-foot minimum set-back. Although the percentage provision is invalid, the minimum absolute set-back would probably be allowed to stand.

It is interesting to note that some of these ordinances in Allegheny County carefully subdivide the set-back section into two subsections, one of which states the minimum in absolute feet and the other which contains the unlawful percentage provision; possibly these ordinances were thus drafted so as to make it easy for

¹³ 298 Pa. at 282.

¹⁴ Ordinance No. 424, May 11, 1942; Recorder of Deeds Book No. 1, p. 281.

¹⁵ Ordinance No. 412, April 6, 1925; Recorder of Deeds Book No. 3, p. 103.

¹⁶ Ordinance No. 370, January 25, 1940, §§ 308, 408, 508; Recorder of Deeds Book No. 2.

¹⁷ Ordinance No. 416, May 11, 1925, § 14; Recorder of Deeds Book No. 1, p. 129.

¹⁸ Ordinance No. 77, June 10, 1929, § 13(b); Recorder of Deeds Book No. 2, p. 233.

a court to separate the valid and the invalid subsections. Possibly some of these ordinances which were enacted long after *White's Appeal* were drafted with the knowledge that one of the subsections would be held invalid if taken to court. It is not unlikely, then, that these provisions have been and may yet be used as a bluff against land-owners, most of whom will accept the ordinance provisions without question and not think of taking them to court. Thus appears a problem similar to those discussed previously in this report—whether or not the enforcement of an ordinance relating to housing should be conducted on the basis of a bluff which the strict letter of the law would not condone.

D. Non-Conforming Uses

Zoning ordinances, like building codes, have not been permitted to operate entirely retroactively. Because of constitutional due process considerations for these vested property rights of individuals, and in order to prevent hardships, the courts have stated that the purpose of zoning ordinances is chiefly to regulate uses of property in the future and not to operate retroactively on uses of property which were being enjoyed before the passage of the zoning ordinance.¹⁹

However, the dividing line between existing non-conforming uses—which the zoning ordinances invariably expressly exempt—and future uses is not always an easy one to mark out. One shades into the other when problems involving extensions, changes, and alterations of non-conforming uses are presented. The purpose of this section is to examine each of the common situations.

In passing, mention may be made of one other class of uses which are exempt from zoning ordinances in addition to pre-existing non-conforming uses. The governmental uses are exempt whether or not they existed before the enactment of the zoning ordinance. In *Harvard v. Haas*,²⁰ the court exempted a state teachers college from a local zoning ordinance because the Commonwealth, in operating the teachers' college under constitutional and statutory authority, was performing a governmental function.

¹⁹ Kahn v. Seeds, 20 D. & C. 361 (Pa. 1934).

²⁰ 59 D. & C. 658 (Pa. 1947).

Another class which now can be exempted from the operation of zoning ordinances is the public utilities. The enabling acts relating to all classes of municipalities in Allegheny County except second class cities state that zoning powers:

"... shall not apply to any existing or proposed building or extension thereof used or to be used by public utility corporations, if upon petition of the corporation, the Public Utility Commission shall, after a public hearing, decide that the present or proposed situation of the building in question is reasonably necessary for the convenience or welfare of the public."

One or two of the municipalities in Allegheny County restate this statutory exemption procedure in their ordinances.

1. Continuation of Uses Existing When Ordinance Passed

All 20 of the Allegheny County zoning ordinances studied contain a section allowing the continuation of non-conforming uses existing at the effective date of the ordinance. In construing such sections the courts have said that the non-conforming use must either be existing at the time of passage, or, if then temporarily discontinued, the circumstances must permit the inference that there was an intention to resume such use at an early date.²¹

Thus the use need not be in actual operation at the time of the adoption of the ordinance if the cessation of actual operation is not so definite as to constitute an abandonment of the use. Where the non-conforming use is not actively being carried on, it may still "exist" at the time of the passage of the ordinance if the existing building by its nature (a stable, or a manufacturing plant, for example) evidences an adaptability to none other than a non-conforming use.²²

However the pre-existing use must be definitely recognizable as a non-conforming use, not merely something hinting at a non-conforming use. In one case²³ the landowner had been operating a rooming house before the adoption of the zoning ordinance. A large lot beside the rooming house had been used for the parking of automobiles; the lot had not been run as a commercial enter-

²¹ *Giunta v. McLaughlin*, 30 D. & C. 644 (Pa. 1937).

²² *Appeal of Haller Baking Co.*, 295 Pa. 247, 145 Atl. 77 (1928).

²³ *Appeal of Yocum*, 142 Pa. Super. 165, 15 A. 2d 687 (1940).

prise but only had been provided as a convenience in connection with the rooming house. Subsequent to the enactment of a zoning ordinance which prohibited commercial parking lots in the area, the rooming house was razed and the owners sought a certificate of occupancy for the operation of a public parking lot, claiming under the ordinance's existing use provision. On appeal to it, the superior court denied the right of the landowners to a certificate, pointing out that the previous use had not actually been that of public parking lot but only one superficially resembling it.

A case involving an Allegheny County ordinance points up another characteristic which is required of non-conforming uses in order that they may be permitted to continue after an ordinance prohibiting them has been passed. This case, *Bellevue Borough v. Reed*,²⁴ decided by the Pennsylvania Superior Court, upheld the conviction of a trailer camp owner for violation of BELLEVUE'S zoning ordinance. The defendant before the enactment of the ordinance had occupied land in the Borough of BELLEVUE for the business of buying and selling trailers. Use of the trailers as residences had been purely incidental to this business. Then a 1941 amendment to the borough ordinance expressly prohibited the use of land in the district for trailer camp residences. The superior court held that the defendant's conviction was valid because he had not established a non-conforming use prior to the enactment of the amendment.

2. *Completion of Previously Authorized Construction*

Where, at the time of the enactment of the ordinance, no non-conforming use actually exists but where a building permit has been issued relating to a proposed non-conforming use, virtually all ordinances in Allegheny County allow the non-conforming construction to be completed, with some limitation.

The most common provision is one, already mentioned in this report, which unqualifiedly allows the non-conforming structure to be erected if the building permit was validly issued more than 60 days before the adoption of the ordinance but allows building permits issued within 60 days to be acted upon only if contracts have been let or construction actually begun.

²⁴ 165 Pa. Super. 114 (1949).

This report has already discussed such a provision with regard to its form and has suggested that in the future such provision should be classed in the ordinances under the non-conforming use sections rather than under the "Interpretation" sections where it is ordinarily placed.

The time period of 60 days appears to be arbitrarily fixed. A period equal to the legal notice period which must precede the consideration of a zoning ordinance would seem to be more reasonable.

A few ordinances in Allegheny County provide, as does section 1308 of PENN TOWNSHIP'S code, that a non-conforming use "authorized by a building permit issued prior [to the adoption of the ordinance] and still valid" will be allowed.

The judicial limitation appears to be made at the point that contracts are let or construction actually begun. Thereafter no local zoning ordinance can prohibit the completion of the non-conforming use. Where a builder has purchased property, made substantial expenditures, and has commenced work pursuant to a permit, he has definitely acquired a vested right which the courts will protect against a subsequently-enacted ordinance or amendment.²⁵ Where actual construction has not begun but contracts for it have been entered into, the courts also say that the owner has a vested right to erect a building which, for example, fails to conform to the height requirements of a later ordinance.²⁶

Apparently then, a zoning ordinance can restrict the right to complete a proposed non-conforming use if the builder has neither begun construction or bound himself by contracts.

A problem similar to the one at hand is presented when a builder begins construction in violation of an existing zoning ordinance but in good faith because a building permit has been erroneously issued to him. A recent case²⁷ dealing with WILKINSBURG Borough in Allegheny County involved this problem. In this case the builder submitted plans to the borough's building inspector

²⁵ Lower Merion Twp. v. Frankel, 64 Montg. 14 (Pa. 1948), affirmed 358 Pa. 430, 57 A. 2d 900 (1948).

²⁶ Herskovits v. Irwin, 299 Pa. 155, 149 Atl. 195 (1930).

²⁷ Gibson v. Wilksburg, 98 Pitts. L. J. 439 (Pa. 1950).

seeking approval for the erection of a house which violated the zoning ordinance set-back requirements. The permit was issued to him and he began working, expending \$554 in good faith. Then the board of adjustment revoked the permit. The Common Pleas Court of Allegheny County held that the board could revoke the permit because the building inspector had no power to issue a permit for a construction not in conformity with the ordinance. However the builder's appeal from the board of adjustment's action was not dismissed, but the court remanded the case to the board of adjustment ordering it to hold a legal hearing to determine whether a variance should be granted. The court also wisely directed the board to consider the builder's expenditure as a matter of hardship.

3. *Structural Alterations to Non-Conforming Uses*

At least two lower court cases have allowed the erection of new buildings on land occupied by a non-conforming use for the purpose of extending that use. The Common Pleas Court of Allegheny County upheld a decision of the Pittsburgh Board of Adjustment which gave a lumber firm a permit to add to its non-conforming use by erecting two new buildings, a shop and a warehouse, on its lot.²⁸ The Pittsburgh ordinance expressly allowed the board the power to grant exceptional permits for structural alterations or additions.

Conversely the Common Pleas Court of Delaware County has reversed a board of adjustment which denied a permit for the addition of new buildings on a lot containing a non-conforming manufacturing use.²⁹ There the court said that where the structural extension will further the elimination of annoyance to nearby residences and where it is necessary for the continued successful operation of the business, the board of adjustment's denial is arbitrary and unreasonable. This case also involved an ordinance provision which expressly empowered the board to grant a permit for a structural extension if certain standards were met. The decision of the common pleas court in effect merely held that the board had applied the standards wrongly.

²⁸ Wick's Petition, 78 Pitts. 241 (Pa. 1930).

²⁹ Alloy Metal Wire Company's Appeal, 29 Del. 488 (Pa. 1940).

A non-conforming use cannot be limited to the precise magnitude which it had at the time the ordinance was enacted. In *Davis Appeal*³⁰ the Pennsylvania Supreme Court dealt with a multiple family dwelling which became a non-conforming use when the district was zoned as a single family one. Subsequently the number of apartments in the dwelling was increased from three to four. The supreme court held that an occupancy certificate should be issued.

Three-quarters of the ordinances in Allegheny County forbid *extensive* structural alterations of non-conforming uses. No cases have been found which question the validity of such provisions, but a municipality probably cannot prevent *slight* structural alterations of non-conforming uses.

4. *Permission to Strengthen Unsafe Structures; Repairs*

The same ordinances which forbid structural extensions invariably permit, however, such structural alterations as are "ordered by an authorized public officer to assure the safety of the building or structure" which already exists as a non-conforming use.

5. *Restoration of Destroyed Buildings; Replacements*

Only two out of the twenty sample ordinances in Allegheny County outside Pittsburgh expressly touch upon the right to rebuild a non-conforming structure if it is destroyed. PENN TOWNSHIP, in section 1308, has a reasonable provision in this regard. It reads:

"No building which has been damaged by fire or other causes to the extent of more than seventy-five (75%) per cent of its value shall be repaired or rebuilt except in conformity with the regulations of the Ordinance. No building which has been razed shall be rebuilt except in conformity with the regulations of this Ordinance."

The 75% measure is a reasonable one but it should be clarified by specifying it as a percentage of replacement cost.

6. *Extension to Non-Conforming Uses Not Involving Structural Alterations*

Where an ordinance permits "existing uses" to be continued after

the enactment of a zoning ordinance, the law is clear that such uses may be extended throughout a particular lot, at least if no structural alterations or additions are made in the face of an ordinance prohibiting structural extensions.

This rule is the result of the judicial definition of the meaning of the phrase "existing uses" which the ordinances permit to be continued. The case which formulated the definition said:

"Neither the extent, quantity nor quality of the use is mentioned, but only that it must exist. Neither the act, the ordinance nor the law generally requires the court to speculate as to the number of acts or business transactions necessary to constitute an existing use. . . . Ordinarily an existing use for business combine two factors: (a) construction or adaptability of a building or room for the purpose, and (b) employment of the building or room or land within the purpose."³¹

A later case took this definition and applied to the situation involving a non-structural extension of a non-conforming use. *Borough of Cheswick v. Bechman*³² said that where the ordinance merely permits "existing uses" to be continued, there is no restraint imposed upon broadening the scope of the existing use. If at the time the ordinance was enacted the exercise of the use did not utilize the entire tract, it may later be extended.

Even before the *Bechman* case, however, some Allegheny County ordinances, now ten of the twenty studied, contained express provisions allowing the extension of a non-conforming use throughout a building. All are worded in exactly the same manner, to the effect that:

"... such use may be extended throughout the building, provided no structural alterations are made [except those for safety purposes], and provided further that such extension does not displace any residence use in a Residence district."

Although these sections refer only to extension of uses throughout a "building", extension of a use throughout a plot of land would be allowed by virtue of the judicial rule stated above.

³¹ *Haller Baking Company's Appeal*, 295 Pa. 257 at 261, 145 Atl. 77 (1928).
³² 352 Pa. 79, 42 A. 2d 60 (1945).

7. *Change of Non-Conforming Use*

About half of the ordinances studied contain provisions relating to changes of non-conforming uses. These provisions are of two kinds: (1) those which permit a change to another non-conforming use of the same or higher class, and (2) those which forbid a use which has been changed to a higher class of non-conforming use from being changed back to the old use.

The first sort of provision is typified by section 12(b) of EMS-WORTH'S Ordinance³³ which says:

"... If no structural alterations are made, a non-conforming use may be changed to another non-conforming use of the same or a higher classification."

A lower court case in Pennsylvania has explained the meaning of the phrases "same class" or "similar class" as contained in such provisions. A Lackawanna County court construed the words "similar class" to mean any class of use which would be permissible in that district in which the original non-conforming use would be a permissible one.³⁴

Such a provision is unduly lenient in that it permits a change to another non-conforming use of the *same classification*. Where the ordinance does not give such permission, the courts have refused to allow non-conforming uses to be changed to similar non-conforming uses over the objection of municipal authorities.³⁵

A change to a *higher classification* apparently would embrace the case where a use which is non-conforming in a residential district, such as an industrial use, is changed to a use, such as a commercial use, which would conform in a district more restricted than an industrial district; such an upward change would be allowed although the new use is still a non-conforming use in the residential district where it is actually located. The provision permitting a change to higher classification is not as subject to criticism on the grounds of leniency because it tends to encourage upgrading of non-conforming uses.

³³ Ordinance No. 416, May 11, 1925; Recorder of Deeds Book No. 1, p. 129.

³⁴ *Smith v. Westpfahl*, 52 D. & C. 51 (Pa. 1944).

³⁵ *In re Imperial Asphalt Corporation's Zoning Appeal*, 51 Lanc. 9 (Pa. 1948).

A second sort of provision always accompanies the type just discussed. Throughout Allegheny County, where employed it reads:

"Whenever a non-conforming use of a building has been changed to a more restricted use or to a conforming use, such use shall not thereafter be changed to a less restricted use."

The effect of this requirement is a healthy one; it insures that the upgrading of a use is permanent.

8. *Effect of Change of District Classification*

Three-quarters of the ordinances studied contain the standard provision that a change of district classification shall not affect non-conforming uses. They may still be continued or changed.

9. *Discontinuance or Abandonment of a Non-Conforming Use*

Closely allied with the provisions preventing the downgrading of a use which has been changed to a non-conforming use of a higher class, are the provisions, contained in thirteen of the twenty ordinances studied, which forbid the resumption of a non-conforming use which has been abandoned; some sections state that discontinuance for a period of one year shall prevent future resumption of the non-conforming use.

Generally the abandonment must be supported by positive evidence of intention. The burden of proof of an abandonment is upon the party attempting to prevent a resumption of the use. Temporary cessations of business uses caused by economic forces do not constitute an abandonment.³⁶ Where a business place is merely left untenanted for a time, the vacancy is usually not construed as an abandonment.³⁷

However, if there is a definite abandonment, as by razing the building or by converting it to a conforming use, the municipal authorities may thereafter have the aid of the courts to restrain a resumption of the non-conforming use.³⁸

Trailer camps which are non-conforming uses may lose their protected status as such if trailers which were present on the land

³⁶ Com. ex rel. v. McBride, 95 Pitts. 337 (Pa. 1947).

³⁷ Westphal v. Bray, 29 Lack. Jur. 238, 20 Mun. 141 (Pa. 1928).

³⁸ Collingdale Borough v. Moyer, 32 Del. 305 (Pa. 1944).

before the prohibitory ordinance was passed are moved out and replaced by other ones after the passage of the prohibition. In such a situation a lower court in Pennsylvania has said that the trailer camp would not have the status of a non-conforming use so far as the new trailers were concerned.³⁹

10. *Required Cessation of Non-Conforming Uses*

The enabling acts of local municipal corporations do not contain any section relating to the power to require that non-conforming uses cease. However, the County Zoning Act of 1937 has a section⁴⁰ which reads:

"The board of county commissioners may in any zoning ordinance provide for the termination of non-conforming uses, either by specifying the periods or periods in which non-conforming uses shall be required to cease, or by providing a formula or formulae whereby the compulsory termination of a non-conforming use may be so fixed as to allow for the recovery or amortization of the investment in the non-conformance."

The rest of this section points out that when the county acquires title to tax-delinquent property which is not redeemed, the future uses of such property shall be conforming ones.

The legislature has not inserted any such power in the enabling acts pertaining to local units other than counties. But the original draft of the new proposed zoning code for Pittsburgh contains such provisions. In Article 20, section 2003-6, the Pittsburgh code proposal would require that in all slope districts and residential districts every non-conforming building designed for a use permitted only in commercial or industrial districts must be "completely removed, or altered and converted to a conforming building . . . at the expiration of a period, hereafter to be specifically computed, within which period it would be possible to amortize only the value of the physical structure at the time of its appraisal."

The same section also states that after the enactment of the ordinance the city planning commission would conduct a survey of non-conforming uses to register the existence and nature of non-

³⁹ *Commonwealth v. Helmuth*, 73 D. & C. 370 (Pa. 1950).

⁴⁰ Act of June 25, 1937, P. L. 2129, § 3; 16 P. S. 510.14.

conforming uses. The ordinance would also require the Pittsburgh Bureau of Building Inspection to initiate a program of appraising those physical structures which are non-conforming ones. After each property has been appraised, the municipal officials would then designate for that particular building an amortization period within which the non-conforming structure must be removed.

These removal requirements are also applied to non-conforming buildings in commercial and light industrial districts.

These provisions will no doubt be modified or perhaps eliminated before the proposed Pittsburgh zoning code is finally approved; however they are here set forth as illustrations of compulsory cessation of non-conforming uses, provisions which to date are rare in the zoning field.

Mr. James Messer, Jr., City Attorney of Tallahassee, Florida, has written one of the few articles which deal with the legality of these provisions. He has carefully examined the few existing cases which deal with the subject. The most recent case, *Standard Oil Company v. Tallahassee*, was decided in the Federal Court of Appeals of the Fifth Circuit in 1950.⁴¹ This case upheld a zoning ordinance in Florida which required the removal of gas stations within business and residential districts ten years after the effective date of the ordinance. The Federal Court of Appeals upheld the provision as related to the police power and stated that considerations of financial loss are insufficient to outweigh the necessity for legitimate exercise of the police power. The United States Supreme Court later in the year refused to review the decision.

Another interesting case dealing with the problem was *State v. McDonald*, in which the Louisiana Court upheld a New Orleans ordinance which required all businesses within a district to remove from the area in one year's time.⁴² In this case also the United States Supreme Court was petitioned for certiorari but the petition was denied.

In conclusion Mr. Messer feels that the required removal of non-conforming uses will be upheld when it is applied to activities which have been traditionally special subjects of police power regu-

⁴¹ 183 F. 2d 410 (1950).

⁴² 168 La. 172, 121 So. 613 (1929). Cert. denied: 280 U. S. 556 (1929).

lations such as storage places for inflammable materials, gas stations and funeral homes. With regard to other activities Mr. Messer states his belief that there is a likelihood that reasonable removal requirements will be upheld.

The reasonableness of the amortization period allowed and the means by which such periods are determined will be key factors whenever the question reaches the courts.

Only one case in Pennsylvania has dealt with the matter. That case is *Drago v. Norristown Borough Board of Adjustment*.⁴³ Norristown did include in its zoning ordinance the following section:

"The Board [of Adjustment] may, after three (3) years from the date of the passage of this Ordinance, upon the presentation of a petition signed by the owners in interest and number of sixty (60) per cent of all property within two hundred (200) feet from any premises on which a non-conforming use exists, order the discontinuance and revocation of the Certificate of Occupancy. However, a public hearing shall be held, written notice of which shall be given to parties affected, ten (10) days prior to such hearing. Such order shall take effect six (6) months after its service upon the parties affected."

Some property owners whose land adjoined a junkyard which was a non-conforming use filed a proper petition with the Board of Adjustment; which denied it, however. The adjoining owners then appealed to common pleas. The court affirmed the board's refusal of the petition, chiefly on the ground that the junkyard was not clearly offensive to the neighbors. However, the court said that the question of the validity or constitutionality of the provision had not been presented because the board had not issued an order under it. By way of dictum the court commented that the validity of such a section was very doubtful.

If a reasonable provision of this nature can be devised, perhaps along the lines suggested by the County Zoning Act, then it might be upheld in a city, borough, or township zoning ordinance even in the absence of express legislative permission. There is always

⁴³ 53 D. & C. 380 (Pa. 1945).

the possibility, of course, that the courts would point out that if the legislature wished the local units to have such power the legislature would have expressly given them it. To overcome such objection, the legislature should expressly by statute confer on all local units the same power to compel cessation of non-conforming uses under reasonable circumstances as has been conferred on counties.

If the local ordinances prescribe an amortization formula as the County Zoning Act suggests, or a grace period sufficiently long so that the investment in the non-conforming use can be written off, then, as Mr. Messer of Tallahassee suggests, the likelihood is great that the courts will uphold the operation of such removal provisions where they deal with those subjects which have traditionally been strictly regulated for police power reasons—gas stations, funeral homes, slaughterhouses, and similar activities. Whether or not ordinances may require the removal of all types of non-conforming uses is a question yet to be answered definitively.

11. Conclusion

In general existing zoning ordinances in Allegheny County do not adequately cover all the situations which revolve about the problem of non-conforming uses. Every zoning ordinance should prescribe rules covering every situation in this section.

CHAPTER XV

ADMINISTRATION AND ENFORCEMENT OF ZONING ORDINANCES; FUNCTIONS OF THE BOARD OF ADJUSTMENT

A. General Administration

1. *Personnel*

Most of the ordinances of municipalities outside Pittsburgh in Allegheny County, if the municipality has a building code, provide that the building inspector shall also be in charge of zoning enforcement. Fourteen out of the 20 municipalities in the Project's study sample use this source of personnel. It is probably the wisest solution because an administrator who is competent enough to enforce a building code will no doubt be equipped to interpret and carry through the less technical provisions of zoning ordinances. Furthermore if one man is employed to administer both building and zoning laws, he will be devoting a greater percentage of his time to municipal duties and the disadvantage which accompanies part-time personnel mentioned in Part One of this report will be lessened.

One out of the 20 municipalities appoint a special zoning inspector. One township designates its township secretary as the enforcement officer. The borough engineer and the borough manager respectively are employed to administer the zoning codes in two of the boroughs. BRADFORD WOODS,⁴⁴ relies on the borough council acting ministerially to administer zoning. The use of council for the administration of a zoning code is open to criticism in that such a procedure distributes the responsibility of enforcement over a body composed of several persons rather than concentrating responsibility in one administrator. Where responsibility is diffused by imposing it generally upon a group, such subdivision often results in destroying responsibility altogether.

But most commonly the administrative officer for zoning codes is the building inspector, where the position of building inspector already exists for the purpose of enforcing a building code.

⁴⁴ Ordinance No. 96, May 2, 1944; Recorder of Deeds Book No. 1, p. 26.

2. *Administrative Procedure*

Virtually all Allegheny County zoning ordinances contain provisions to the effect that applications for a building or occupancy permit shall be initiated by the submission of plats and plans to the administrator.

However, there is some difference among the municipalities as to the form of the permit and as to conditions precedent to the issuance of the permit.

Three out of the 20 ordinances studied provide merely that a building permit shall be issued if the plans comply with the ordinance. On the other hand a majority of the municipalities, 16 of them, provide that an occupancy permit shall be issued "for the purpose of maintaining, renewing, changing, or extending a normal use," and in addition provide that where a building is structurally altered or erected the occupancy permit shall be issued at the completion of the construction and before the building is used or occupied. In such latter cases the zoning occupancy permit procedure is tied in with the building permit procedure. For example the ordinance of AVALON,⁴⁵ states:

"Certificates of occupancy and compliance, either for the whole or a part of the building, shall be applied for coincident with the application for a building permit and shall be issued within ten (10) days after the erection or structure alteration of such building or part shall have been completed in conformity with the provisions of the office of the building inspector. . . ."

"No permit for excavation or the erection of any building or part of a building, or for repairs to or alteration of a building shall be issued before application has been made for certificate of occupancy and compliance."

This method, linking the issuance of an occupancy permit showing compliance with the zoning code with the issuance of a building permit relating to the building code, is commendable. It should be made the rule in every zoning ordinance.

⁴⁵ Ordinance No. 763, August 2, 1940; Recorder of Deeds Book No. 2, p. 64.

B. The Board of Adjustment

The provisions of the enabling statutes which require a zoning board of adjustment to be established have been briefly discussed in Chapter IX of this Part. These provisions, which are contained in similar form in the enabling statutes applicable to every class of municipality, require a board consisting of three members to be appointed. The board of adjustment must establish rules governing its own procedure and must keep thorough records of its proceedings and actions. The functions of the board of adjustment are threefold: (1) hearing of appeals taken from the action of the zoning ordinance administrator, (2) granting variances from the terms of the zoning ordinances where special conditions of hardship are present and (3) deciding whether or not special exceptions which the ordinance refers to the board of adjustment shall be allowed.

The ordinances in Allegheny County generally follow these statutory provisions. Nineteen out of the 20 ordinances studied mention the establishment of a board of adjustment. Again BRADFORD WOODS is an exception, as also is GLASSPORT.⁴⁶ Both of these boroughs refer the board of adjustment's powers to their borough councils, but they do not expressly designate the borough councils as the boards of adjustment.

Most of those ordinances which expressly set up a board of adjustment restate part of the statutory provisions, those sections which describe the powers of the board. Although two ordinances merely state that the board of adjustment "shall act according to law," the rest expressly give the board the power to hear appeals to decide special exceptions and to authorize variances. They also state that the board of adjustment may formulate rules governing its own procedure, but in a few cases the ordinance itself sets forth the rules which shall control the board's deliberation.

In general the board of adjustment provisions in Allegheny ordinances are adequately full and accurate. Where the zoning ordinance sets forth the rules of procedure governing the board of adjustment, its rules must not conflict with the provisions of

⁴⁶ Ordinance No. 424, May 11, 1942; Recorder of Deeds Book No. 1, p. 281.

the enabling statutes but they may be more strict and severe than the statutory provisions.⁴⁷

The difficult questions are those relating to the board of adjustment's jurisdiction over variances and special exceptions.

(*Special Note:* At the time this report was being prepared for publication, three bills have been introduced into the 1951 session of the Pennsylvania legislature. These bills would change the laws applicable to the boards of adjustment in boroughs, first class townships and second class townships so that the board of adjustment in those municipalities could no longer itself grant variances and decide special exceptions, but could only make recommendations with regard to such matters to the borough council or first class township commissioners or second class township supervisors. At the time of the present writing, the passage of these bills is unlikely; but if they do pass, then with regard to boroughs and townships the board of adjustment's variance and special exception functions will be transferred to the ordinance-enacting bodies, leaving the board of adjustment only the power to make recommendations to such bodies. If such a transfer of powers comes about, then the statements made here with reference to the board of adjustment will probably apply equally well to the bodies which then would have the final powers over variances and special exceptions.)

1. *Variances*

The provisions of the enabling statutes which relate to variances read:

“[The board shall have the power] to authorize, upon appeal in specific cases, such variance from the terms of the ordinance as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the provisions of ordinance will result in unnecessary hardship, and so that the spirit of the ordinance shall be observed and substantial justice done.”

If this delegation of power to boards of adjustment is measured up against the criteria which are discussed with relation to building code administrative discretion in Chapter VII of this report, it is

⁴⁷ Toland v. Newton Township, 35 Del. 21 (Pa. 1947).

likely to appear too general and indefinite to be valid. However, it is settled in Pennsylvania that this delegation of the power to authorize variances and special exceptions is a valid delegation of administrative power.⁴⁸

The courts have said that the standards of "public interest," "unnecessary hardship," and "substantial justice" are standards which adequately limit the boards' discretion. Probably the courts have been disposed to find these very general standards adequate because of the pressing necessity for some administrative flexibility in zoning. Another consideration which may have helped validate the board of adjustment powers is that the statute makes the board's decisions readily subject to review in the common pleas court.

If the statutory description of board of adjustment powers is valid, then it follows that where the ordinances restate the statutory provisions the ordinances also will be valid.

The courts constantly reiterate the statutory requirement that variances cannot be granted unless there are real, practical difficulties or hardships in the way of carrying out the express provisions of the ordinance.⁴⁹

Variances must be distinguished from special exceptions. A special exception is a matter relating to the use, height, or area requirements which the provisions of the ordinance specifically name and expressly refer to the board of adjustment; for example, a common special exception is one which allows filling stations to be erected in a residential district only after the board of adjustment approves a petition for such an enterprise. On the other hand the exact meaning of a variance is not limited to matters which the ordinance expressly refers to the board of adjustment. A variance from any kind of requirement may be authorized if the required considerations are present.

The variance power should not be exercised where changed conditions affect an entire neighborhood; the courts have said that in such a situation the only remedy is an amendment of the zoning ordinance.⁵⁰

⁴⁸ Huebner v. Philadelphia Savings Fund, 127 Pa. Super. 28, 192 Atl. 39 (1937).

⁴⁹ Fleming v. Prospect Park, 24 Del. 149, 25 Mun. 120 (Pa. 1933).

⁵⁰ Price v. Chester Zoning Board of Appeals, 30 Del. 478 (Pa. 1941).

Generally the courts have said that the variance power cannot include the granting of permission for a use which the ordinance clearly prohibits in the district. The board may modify a zoning regulation in harmony with the general spirit of the district use regulations, but cannot change the classification.⁵¹

Thus variances actually may deal with minor use, height and area limitations. Only a few cases in Pennsylvania have permitted the establishment of a new use in the district where such uses were prohibited. For example the *Chester Zoning Ordinance Case*⁵² said that the board of adjustment should allow an auto salesroom to be erected on a vacant lot in a residential zone which faced a main highway over which heavy traffic passed. The court maintained that the denial of a variance was unjustified because the residential zone was actually largely of a business nature; several business properties including a junkyard were located near the lot in question. The court said that a variance should be granted in order to prevent the petitioner from being subjected to "unnecessary hardship" as the statute states. However this decision is not in accordance with the general rule; there is no hardship in denying a permit for the erection of an entirely new commercial use in a residential district. The court probably allowed the variance not so much on the grounds of hardship, but rather because it felt that the district had been wrongly described as residential in the first place.

The decision in the case mentioned above is especially surprising because the courts generally will reverse the board of adjustment's decision only when the decision demonstrates a flagrant abuse of discretion. The rule is much more likely to be that the board of adjustment would be abusing its discretion if it granted a variance for the erection of an entirely new use in an area where such a use is prohibited. The variance power should be limited to those situations where a *change* of actual conditions so bears upon a lone existing use as to make continued enforcement of the strict letter of the regulations inequitable, or where the changed conditions are such that proposed uses may deviate slightly from the precise

⁵¹ Appeal of Blank, 90 Pitts. L. J. 159 (Pa. 1942).

⁵² 19 Del. 139 (Pa. 1928).

requirements. Most cases forbid the board of adjustment from permitting a use the whole nature of which is prohibited by the ordinance. Where changed conditions have converted a residential district into one which more appropriately should be classed as commercial, the change of classification should be uniformly enacted into law by the local legislature, not approached piecemeal by boards of adjustment or the courts.

Because the chief justification for a variance is the uniqueness of the situation surrounding a particular lot, where a variance is at all authorized, the board of adjustment should consider the petition upon its own unique facts. The granting of a variance does not set a precedent, even though future cases may be alike in some respects.

2. *Special Exceptions*

Special exceptions have already been defined as those matters which the ordinance allows on condition that the approval of the board of adjustment is secured. Sometimes the board's approval also is conditioned upon other factors, such as obtaining the written consent of neighboring property owners to the proposed exception. Frequently special exceptions are employed to avoid a blanket prohibition of a structure or use which would be harmful to a neighborhood only if the structure is built or if the use is conducted in a certain way. Already mentioned in this report have been some ordinance provisions which make the extension of a non-conforming use a special exception subject to board approval; ordinarily, however, in Allegheny County such extensions are permitted outright.

The ordinance of BRADFORD WOODS has a very general exception provision in connection with its commercial district. Section 5(5)(c) says that "All contemplated uses other than those enumerated shall be approved by an affirmative vote of at least five (5) members of the entire councilmanic membership." Such general exception provisions are entirely too broad. More common are provisions which provide for special exceptions in the case of garages, auto repair shops, and filling stations.

Legality of Requirement that Property Owners Consent to Special Exceptions: A majority of the ordinances studied contain

provisions which require that when a petition seeking a special exception is presented to the board it must be accompanied by the written consent of a certain percentage of neighboring property owners. For example the ordinance of BEN AVON⁵³ provides that an exception for the erection of a major garage in a commercial district may be granted only if the application bears:

“ . . . the written consent of the owners, in interest and number, of sixty (60) per cent of all the property within one hundred (100) feet of the proposed structure and not separated therefrom by more than one street forty (40) feet or more in width. . . . ”

Property already used for major garages and filling stations is counted as consenting; the property owned by the applicant is not counted. The provision relating to filling stations is very similar.

The legal aspect of these provisions requiring property owners' consent is important in Allegheny County because such provisions are contained in at least 13 of the county's ordinances and perhaps more. In the United States as a whole the state courts are in disagreement as to whether requiring such consents constitutes an unconstitutional delegation of legislative power or an unconstitutional deprivation of due process. The courts of Missouri,⁵⁴ Ohio,⁵⁵ and South Carolina⁵⁶ are among those which have held such provisions invalid.

In Pennsylvania the decisions of both the Pennsylvania courts and of United States Supreme Court are pertinent. In *Seattle Title and Trust Company v. Roberg*⁵⁷ the United States Supreme Court held a zoning ordinance from the state of Washington invalid because it required the written consent of a certain percentage of nearby landowners to the erection of a home for children or for the aged in a residential district. The Supreme Court said that such a requirement imposed on such a use violated the due process clause of the 14th amendment in that it permitted the use of prop-

⁵³ Ordinance No. 359, October 24, 1924, Sections 9, 10; Recorder of Deeds Book No. 3, p. 28.

⁵⁴ *St. Louis v. Howard*, 119 Mo. 241, 24 S. W. 770 (1893).

⁵⁵ *Adams v. Gorrell*, 28 Ohio App. 55, 161 N. E. 786 (1927).

⁵⁶ *Willis v. Town of Woodruff*, 200 S. C. 266, 20 S. E. 2d 699 (1942).

⁵⁷ 278 U. S. 116 (1928).

erty to depend upon the arbitrary whim of private persons, persons not bound by any official duty.

The leading case on the point in Pennsylvania is *Perrin's Appeal*,⁵⁸ which dealt with a Pittsburgh zoning ordinance which in one section prohibited the use of commercial district properties for a gas station; however, another section allowed a service station in a commercial district if no part of the structure was closer than 15 feet to the street line and if the application was accompanied by the written consent of all owners of a majority of the property fronting on the same street within 30 feet of the proposed location. The Pennsylvania court said that the consent requirement was valid. The court pointed out the fact that the proposed filling station involved in the case, although it was within a commercial district, was within a few feet of a residential district. The court distinguished the United States Supreme Court's *Roberg Case* on the ground that the use dealt with in that case was an inoffensive one. On the other hand, the Pennsylvania court said, a gas station, if located near a residential district, could be a nuisance which at the suit of neighboring property owners might be enjoined by the courts in the absence of a zoning ordinance. The court further said that where a gas station is rendered offensive by nuisance considerations as well as by the zoning ordinance's express prohibition, then the "consent provision . . . is but a limited delegation" of discretion to the neighboring landowners. The court said that the consent power is not absolute because a court of equity would prevent its abuse if necessary. "There is little or no chance for discrimination . . . ; because if anyone is aggrieved, the courts in the exercise of a supervisory discretion for those injured, may . . . prevent such discriminations." Even if a majority of the neighboring property owners had consented to the erection of the filling station, the Pennsylvania Supreme Court pointed out, the non-consenting minority could nevertheless have a court of equity enjoin the use if it really constituted a nuisance regardless of the provisions of the zoning ordinance. The court likened the situation to that appearing in a United States Supreme Court decision which

⁵⁸ 305 Pa. 42, 156 Atl. 305 (1931).

proceeded the *Roberg Case*. In *Cusack v. City of Chicago*⁵⁹ the United States Supreme Court had upheld an ordinance which required private persons' consent to the erection of large billboards because billboards are offensive structures, at least in most neighborhoods. The effect of this *Cusack* decision was that the requirement of consent could be imposed as an additional condition under the same power which permits the municipality's legislative body, if it so desires, to prohibit entirely structures or uses which are offensive.

Thus the decisions made by both the Pennsylvania Supreme Court and the Supreme Court of the United States seem to be based upon whether or not the use for which private consent is required is an offensive one. If the use is not offensive and if it is not such that a court of equity would consider enjoining upon the suit of private persons, then the conditioning of special exceptions upon neighbor's consent will probably be invalid. However, if the use is such that private persons could have it enjoined without regard to zoning regulations, then the consent requirement will be approved.

Judging by these criteria, all the special exceptions requiring consent which are contained in Allegheny County zoning ordinances are valid because they deal with such enterprises as filling stations, major garages, repair shops and billboards, which courts of equity have under some circumstances enjoined as nuisances.

3. *Appeals to the Board of Adjustment*

In addition to hearing and deciding cases involving special exceptions, the Board of Adjustment is also empowered to hear appeals from the decisions of the administrator of the zoning regulations, who is usually the building inspector. Often questions involving variances come to the Board of Adjustment by way of appeal from the administrator's decisions. The statutes allow the board to reverse, affirm, or modify the order appealed from.

⁵⁹ 242 U. S. 526 (1917).

4. *Appeals to Common Pleas from Decisions of the Board of Adjustment*

All the enabling statutes state further that any person aggrieved by "any decision of the Board of Adjustment, or any taxpayer or any officer . . . , may within 30 days" appeal to the court of common pleas of the county on the ground that the decision is an abuse of discretion or otherwise not in accordance with law.

As part of its decision procedure, a board of adjustment should take all relevant testimony and from it draw findings of fact and conclusions of law; the board should set forth its decision in writing, to make a record from which an appeal may be taken.⁶⁰ In effect the board of adjustment is required to make a return of its proceedings when the board's decisions are appealed to common pleas. The return must concisely set forth the pertinent facts in order to show the grounds of the decision appealed from. Ordinarily the board of adjustment is made the respondent in the appeal.⁶¹

Even though the appellate courts have stated again and again that the board of adjustment has the duty to make a return to the common pleas showing the testimony and evidence involved in the decision appealed from, as Mr. Albert Smith Faught has pointed out, "this mandate is continually disregarded."⁶²

As Mr. Faught recommends, the zoning ordinance should expressly require the board of adjustment to take down testimony so that it may be available whenever an appeal is taken to the court of common pleas.

When the appeal reaches the court of common pleas, that court usually gives the factual findings of the board of adjustment very great weight. The common pleas courts may, if they feel more evidence is necessary, take new evidence. Ordinarily, however, they will rely solely upon the findings of the Board of Adjustment for the facts. The board's findings are given recognition similar to that accorded to state or federal administrative agencies by the

⁶⁰ Palletz Appeal, 71 D. & C. 303 (Pa. 1950); Corsino v. Zoning Board of Adjustment, 73 D. & C. 500 (Pa. 1950); Appeal of University of Pennsylvania, 29 Del. 322 (Pa. 1940).

⁶¹ Brosnan's Appeal, 129 Pa. Super. 411 at 420, 195 Atl. 469 (1937).

⁶² Faught, *Zoning under Changing Conditions in Pennsylvania*, 10 UNIVERSITY OF PITTSBURGH LAW REVIEW 310 (1949).

courts. Where the board of adjustment has not erred in applying the law, its findings of fact will not be reversed unless there is a manifest and flagrant abuse of discretion or unless the findings have no reasonable basis at all.⁶³

On the present legal relationship between the common pleas courts and the boards of adjustment, Mr. Albert Smith Faught comments as follows:

"In the opinion of the writer the firm reliance of the courts upon the decisions of the board of adjustment when supported by substantial evidence has worked out well in practice, except in those cases in which the absence of any person learned in the law sitting as a member of the board has militated against the reaching of a sound decision. Errors of law may easily be corrected by the courts, but only with difficulty is a court able to correct a factual ruling, supported by evidence, but reflecting political, partisan or other prejudice."⁶⁴

5. *Remedies of Neighboring Property Owners*

As stated in the preceding section, all the enabling statutes allow "any person aggrieved" by the decision of the board of adjustment or "any taxpayer" to appeal to the court of common pleas seeking a reversal of the board's decision. Ordinarily property owners cannot attack the decisions of the board of adjustment directly by a bill in equity seeking a court injunction. Except in special cases, they must first seek relief from the board of adjustment itself and if denied it there, then take a statutory appeal to common pleas court seeking a reversal of the board's decision. There are exceptions to this rule, however. Where the action of the board of adjustment is such that its effect would permit the erection or continuance of a nuisance any person affected may directly seek an injunction and need not follow the statutory appeal procedure.⁶⁵

In a few other situations property owners who object to the decisions of the board of adjustment may proceed directly to peti-

⁶³ Application for Certificate of Occupancy, 362 Pa. 116, 66 A. 2d 225 (1949); Liggett's Petition, 291 Pa. 109, 139 Atl. 619 (1927); Appeal of Krinks, 128 Pa. Super. 405, 194 Atl. 231 (1937).

⁶⁴ 10 UNIVERSITY OF PITTSBURGH LAW REVIEW at 325.

⁶⁵ Rodgers v. Vennett Building Company, 89 Pitts L. J. 359 (Pa. 1941); De Blasius v. Bartell and Oliveto, 143 Pa. Super. 485, 18 A. 2d 478 (1940).

tion for an injunction without following the appeal procedure. These situations may be described as those cases in which the appeal procedure would be too slow; thus the procedure at law would be deemed an inadequate one and the court's equitable jurisdiction could come into play.

A recent case has described another situation in which a direct suit for an injunction may be more appropriate than the statutory appeal. This case, *Wood v. Goldvarg*,⁶⁶ typifies the situation in which the administration of the zoning ordinance is not directly involved, a situation where the rights of the property owners depend more directly upon an agreement between themselves than upon the zoning regulations involved in the agreement.

This *Goldvarg* case involved BRENTWOOD, an Allegheny County Borough. In 1946 the defendant in the case had petitioned council for a zoning change which would allow him to erect a double duplex in a single-family dwelling zone. Neighboring property owners instituted a protest to the council but the defendant entered into a contract with them promising to aid their efforts to have a nearby street improved if they withdrew their objections to the zoning change. The defendant's intention to erect only a double duplex figured strongly in the negotiation of the contract. With the protest out of the way, the zoning commission recommended that council change the classification and an amending ordinance was passed allowing any multiple dwelling to be erected in the area in which the defendant's property was located. The defendant then began to erect a 14 family apartment house contrary to his original intention to erect only a double duplex. In order to forestall his action, the plaintiffs, neighboring landowners, instituted a bill in equity to enjoin the defendant from erecting a large apartment house. The Pennsylvania Supreme Court allowed the decree on the ground that the legal remedy by way of an appeal to the board of adjustment from the issuance of a permit and then to the court of common pleas would be such a slow procedure that the defendant's building would be finished before the plaintiffs could obtain relief.

⁶⁶ 365 Pa. 92 (1950).

C. Enforcement

In the enforcement of zoning codes, as in the case of building codes, court action should be a last resort. The authorities should first attempt to prevent violations by withholding permits and by denial of appeals at the level of the board of adjustment. Only if these devices fail should resort be made to fines or equitable remedies.

1. Fines

All the zoning ordinances in Allegheny County provide monetary fines for violations and imprisonment upon failure to pay the fine.

The zoning enabling statutes do not mention the imposition of monetary penalties but the municipalities have the authority to levy fines under those statutes which prescribe the enforcement powers for all types of general ordinances. Third class cities and first and second class townships may impose fines up to \$300, but second class cities (Pittsburgh) and boroughs are limited to a maximum of \$100. There is no apparent reason for this inconsistency between the maximum fine allowable and the class status of the various municipalities.

If \$300 is a fit maximum penalty for ordinances in general, including the zoning ordinances of third class cities and townships, then the same higher maximum should be available to second class cities and boroughs.

2. *Injunctions Against Zoning Ordinance Violations Which Constitute Nuisances*

Nuisances as the courts define them have been discussed previously in this report in Chapter VIII. Where the violation of a zoning ordinance constitutes a nuisance, no particular statutory authority is required to enable municipal authorities to go into court and get an equity injunction restraining or abating such violation. Equity has jurisdiction, the courts have said, to restrain the erection of buildings whether or not prohibited under the zoning ordinance where the erection of the proposed building would amount to a nuisance and would deprive others of the quiet, healthful and safe enjoyment of their properties.⁶⁷

⁶⁷ Mervis v. Conway, 76 Pitts. L. J. 183 (Pa. 1927).

3. *Statutory Authority to Obtain Injunctions Restraining Any Violation*

Where the threatened or existing violation of the zoning ordinance does not amount to a nuisance, the municipal authorities cannot obtain any equity injunction unless the statutes expressly give them power to do so or unless the statutes declare that violations shall be treated as nuisances.

In Pennsylvania the zoning enabling acts which relate to third class cities, boroughs and townships contain sections which expressly allow the authorities to seek an injunction against any violation.⁶⁸ The Borough Code section is an example:

"In case any building or structure is erected, constructed, reconstructed, altered, repaired, converted or maintained, or any building, structure, or land is used in violation of this Article or of any ordinance or other regulation made under authority conferred hereby, the proper local authorities . . . , in addition to other remedies, may institute any appropriate action or proceedings to prevent such unlawful [acts], to prevent the occupancy of said building, structure, or land or to prevent any illegal act, conduct, business or use on or about such premises."

However the statutes relating to second class cities do not contain any such express power to obtain injunctions against zoning ordinance violations, nor does the statute applicable to this class mention that zoning ordinance violations shall be treated as nuisances. Therefore, second class cities today do not have the power to get judicial aid in enjoining a violation which is less than a nuisance; where the violation cannot be enjoined as a nuisance, a second class city may rely only upon monetary penalties for the enforcement of its zoning ordinances.

To the zoning powers of second class cities the legislature should add a statute which expressly allows the aid of courts of equity in restraining or abating threatened or existing violations of zoning ordinances.

⁶⁸ Third class cities: Third Class City Code as revised by Act. No. 164, 1951, § 4106. Boroughs: § 3308 of the Borough Code, added by the act of July 10, 1947, P. L. 1621, § 93; 53 P. S. 15211.8. First class townships: First Class Township Code as amended by the act of May 27, 1949, P. L. 1955, § 59; 53 P. S. 19092-3108. Second class townships: § 2008 of the Second Class Township Code, added by the act of July 10, 1947, P. L. 1481, § 47; 53 P. S. 19093-2008.

CHAPTER XVI

ACHIEVEMENT OF INTEGRATION IN ZONING THROUGH COUNTY ZONING UNDER STATUTORY AUTHORITY

A. Necessity of Integration in Zoning

This report has already touched upon the unfortunate results which arise when the zoning regulations of two adjoining municipalities clash at the boundary line. The benefits obtained by the establishment of a residential district will be defeated in large degree if the district is immediately bordered by the industrial district of a neighboring municipality.

So long as the zoning power remains geographically split up among the cities, boroughs and townships, joint consultation by local authorities has been suggested as the remedy to boundary clashes. This practice has actually been followed to an informal degree in the promulgation of some of Allegheny County's zoning codes. However, all the municipalities in one area do not enact or amend their zoning codes simultaneously; joint consultation upon the nature of border areas is seldom possible. Of course the municipalities which enact a zoning code later than their neighbors will strive not to place a residential district adjacent to an industrial district already existing in adjoining territory. But no way exists to require that the municipalities who establish zoning later do not set up their own industrial district next to the residential area of their neighbors.

Besides producing border clashes, the split-up nature of zoning power results in another problem. This report has already mentioned some municipalities which have permitted only residential uses within their borders. There are others which allow only residential or commercial uses. Although the legality of thus excluding commercial or industrial uses entirely is subject to examination by the courts on the ground of reasonableness in each case, the courts, because of the very nature of the judicial process, can do nothing to prevent the inequitable allocation of land areas to the various uses over a wide area such as the county. Some municipalities have allocated more land than necessary to non-residential uses; some

have allowed residential uses only. With the zoning power subdivided, there is no safeguard to insure that the separately-exercised discretion of each municipality will average out so that the county area as a whole will be properly divided between residential and non-residential uses in a manner calculated to accommodate future trends. Even if the total areas allotted to each type of use should happen to balance properly with the actual needs countywide, there is no assurance that location of all use areas within the county will be suitable to actual needs, present and future.

The goal of equitable distribution of use areas throughout the county could more likely be achieved if the zoning power for the whole county were removed from the cities, boroughs and townships and placed in the county administration. However, because of the likelihood that such legislation could not be obtained for some time, this solution must necessarily be regarded as a long-range expedient.

At present statutory authority exists for the county to zone all areas outside cities, boroughs and townships of the first class; such county zoning regulation by law takes precedence over any zoning ordinances of second class townships. Statutory power also exists permitting the formation of county or regional planning commissions, made up of representatives of two or more counties or counties and political subdivisions of counties, which could implement cooperative countywide or region-wide zoning on a voluntary basis. The short-range solution may be found in these two items of legislation.

B. Present County Zoning Powers

1. *Scope*

In 1937 the County Zoning Law⁶⁹ was added to the General County Law. In general the County Zoning Law closely resembles the enabling acts applicable to the political subdivisions of the county. However, the county at present may zone only the "portions of such county which lie outside of cities, boroughs and townships of the first class. . . ."

⁶⁹ Act of June 25, 1937, P. L. 2129, § 13; 16 P. S. 510.1 et seq.

2. *Exercise of Powers*

The county must exercise the powers by the establishment of a county zoning commission of three, five or seven members. Where a county planning board has been established, as in Allegheny County, the planning board may act as the zoning commission. After study by the planning or zoning board, the power to enact the ordinance is given to the board of county commissioners.

Before the commissioners may act, the zoning commission must prepare the zoning plan and ordinance and hold at least one public hearing upon it pursuant to fifteen days' notice. And before finally adopting and certifying any plan, the zoning commission must submit its tentative results to the State Planning Board, whose approval is presumed unless the Board submits advice and recommendations within forty-five days. These recommendations by the State Planning Board are not binding, apparently; if the zoning commission does act upon them and make changes in the plan, the changes may be made without a public hearing and they need not be submitted to the State Planning Board.

When the county commissioners receive the final product of the zoning commission, they must hold a public hearing pursuant to thirty days' notice. Any changes made by the county commissioners must be submitted back to the zoning commission which may within thirty days make a new report; such further suggestions by the zoning commission have only advisory effect.

3. *Amendments*

The amendment of a county zoning ordinance after one has been enacted must follow a procedure different from that prescribed by the enabling acts relating to the political subdivisions. The board of county commissioners may amend the districts or the zoning regulations, but "no such amendment shall . . . become effective until the same shall have been proposed by or be first submitted for approval, disapproval or suggestions to the zoning commission and the Pennsylvania State Planning Board." However, any approval, disapproval or suggestions made by the zoning commission or State Planning Board have advisory effect only and are not binding on the county commissioners. The commissioners need

only wait until the zoning commission or Planning Board submits a report on the proposed amendment; if no report is received the county commissioners may enact the ordinance after waiting thirty days from the time the amendment was submitted to the zoning commission and Planning Board. Before the final adoption, however, a public hearing must also be held, pursuant to thirty days' notice.

4. Administration and Enforcement; Board of Adjustment

Unlike the other enabling acts, the County Zoning Act specifies the penalties for violation of zoning ordinances. The act expressly states that persons guilty of violations shall be subject to a fine not exceeding \$100 or imprisonment for not more than 10 days or both. The district attorney of the county or "any owner of real estate within the district" in which a violation occurs may institute judicial proceedings to enjoin or abate the violation.

The provisions for a board of adjustment are the same as in the other enabling acts except that:

"The boards of county commissioners of two or more counties may arrange and provide for a joint or common board of adjustment of four or five members, which joint or common board of adjustment shall be deemed the board of adjustment of each of such counties."⁷⁰

5. Non-Conforming Uses

Already mentioned, in Chapter XIV, has been the power, unique with the County Zoning Act, to require the termination of non-conforming uses even though they existed before the passage of the ordinance forbidding them. Two general methods are provided: (1) the zoning ordinance may set forth a formula for the determination of periods after which the use must cease, the periods to be long enough to allow for the recovery "of the investment in the non-conformance," and (2) the act itself states that if the property on which a non-conforming use is situated becomes county property through tax-delinquency and is not redeemed, future uses of such property cannot be non-conforming ones.

⁷⁰ Act of June 25, 1937, P. L. 2129, § 3; 16 P. S. 510.10.

6. Conclusion

In general, then, the county zoning act gives the county powers similar to those conferred on the local subdivisions, with the additional limitation that the State Planning Board must be consulted with regard to proposed enactments and amendments. The county, furthermore, has express power to require the cessation of non-conforming uses under certain circumstances.

In order to make a beginning to the achievement of countywide integration in zoning, the county should exercise the power which the legislature has given it by enacting a county zoning ordinance which will cover all the area outside of cities, boroughs and first class townships.

C. Proposed Changes in County Zoning Statutes

In the 1951 session of the Pennsylvania legislature at the time of this writing several bills had been introduced which would affect county zoning powers drastically.

Several bills if passed would extend county zoning powers. As stated above, counties today may enact zoning ordinances affecting only those portions of the county outside cities, boroughs and first class townships but a new County Code, Senate Bill No. 693, would in section 2220 extend county zoning powers so that county commissioners could regulate by zoning any part of the county which does not already have local municipal zoning ordinances in effect. Section 2237 of the same bill also states that: "Any county may, but need not apply its zoning ordinance to any or all cities and boroughs not having and enforcing their own zoning ordinances and failure to include any and every such city and borough within its zoning ordinance shall not affect the validity thereof." The same section restates the provision that county zoning ordinances could not be effective in any political subdivision which has and continues to enforce its own zoning ordinance. Also, under the provisions of the bill, no county ordinance could prevail over airport zoning regulations.

This new County Code, which is likely to be passed by the legislature, thus would extend county zoning powers to embrace all those portions of the county not already governed by zoning. Such

an extension of powers would permit the counties to insure that zoning regulations were provided for the entire county. Those portions of the county covered by county ordinances would then be governed by a unified zoning plan, which in turn could be drawn up in cooperation with those political subdivisions which have their own zoning ordinances so that a large measure of integration in zoning could be achieved throughout the entire county.

If this new county code passes a problem will arise with which the bills have not dealt specifically. Under the present law, although counties are restricted to zoning only second class township areas, if county zoning ordinances are passed, they supersede second class township zoning ordinances. Under the proposed new law, apparently, county zoning ordinances would no longer operate to supersede zoning ordinances in second class townships; to this extent, so far as second class areas are concerned, the new County Code would narrow county zoning powers. But in total effect, since the counties would be empowered to zone the areas of all classes of political subdivisions which do not already have their own zoning regulations, the county zoning power would be expanded.

Senate Bill No. 814 and House Bill No. 1627, also introduced in the 1951 Pennsylvania legislature, would similarly expand county zoning powers. But if the new County Code described above is passed, there will be no need for these separate bills.

Two other bills, Senate Bill No. 802, House Bill No. 1601 have been introduced currently in Pennsylvania. These two bills, unlike the County Code mentioned above, would operate to narrow county zoning powers. These bills would remove the power to pass zoning ordinances from all counties except counties of the second and third class and except those counties which have already created zoning commissions. Under these bills the zoning powers of the excepted classes of counties would remain as they are at present; that is, those counties from which the zoning power is not removed would still have only the power to enact zoning ordinances governing second class township areas.

D. Cooperative Zoning Throughout the County; Regional Planning Commissions

In addition to the mandatory zoning powers which the county has been given, the present County Zoning Act also allows the county to participate in voluntary cooperation with other counties and with those municipalities over which the county cannot exercise its mandatory powers. The pertinent section of the act reads:

"The zoning commission of any county may cooperate with the zoning commissions of other counties and with the planning, zoning, legislative, and administrative authorities of cities, boroughs, first-class townships and other municipalities, either within or without such county, with a view to coordinating and integrating the zoning of the county with the planning and zoning of other counties or of municipalities. . . ."⁷¹

Furthermore, the County Planning Law of 1937 contains sections⁷² which permit such cooperation to be implemented by the formation of a regional planning commission.

The regional planning commission, membership of which is determined by the cooperating authorities, may make a master plan for the region so cooperating. The legislative bodies of the cooperating municipalities and counties may by ordinance delegate any of the functions of their respective planning commissions to the regional commission. Since the zoning enabling acts permit the municipal planning commissions to act as zoning commissions, the formulation of a proposed master zoning ordinance can thus be delegated to the regional commission.

Of course, after the regional commission is thus equipped and after it adopts a uniform zoning plan for the entire region, the adoption of the respective portions of the ordinance still rests with the legislative bodies of the various cooperating municipalities, as the Institute of Local and State Government has pointed out. Cities, boroughs, and first class townships still have independent power to agree or refuse to enact for themselves the parts of the regional zoning plan applicable to them. Of course, county authorities may accept and enact so much of the proposal as applies to

⁷¹ Act of June 25, 1937, P. L. 2129, § 3; 16 P. S. 510.9.

⁷² Act of June 25, 1937, P. L. 2124, § 1; 16 P. S. 507.2-507.4.

second class townships within the county—the areas outside of cities, boroughs and first class townships; as in the case of non-cooperative zoning planning, county enactments will supersede those of second class townships.

When a cooperating municipality has enacted the portion of the regional zoning proposal which covers its own area, the administration of that zoning ordinance also remains the individual function of the particular municipality.

Thus, in spite of the disadvantages of the still-existing decentralization of zoning ordinance enactment and administration, cooperative regional zoning can go far toward achieving the uniformity and proper distribution of land areas throughout an entire county or region.

Until the counties are given mandatory power to zone all the area within their boundaries, the formation of a cooperative regional planning and zoning commission, whose proposal would be enacted into law by the several participating authorities, can do much toward eliminating the boundary clashes, lack of uniformity, and poor land use distribution which exists today.

Proposed revisions of the law governing county and regional planning commissions would not drastically affect the present status of such planning commissions. Section 2201 of Senate Bill 693, the new County Code proposed in the 1951 session of the Pennsylvania legislature, would merely add the requirement that a specified number of the members of the planning commission must be residents of the boroughs and townships in the county and that all members of the commission must be appointed with consideration for geographical and population factors.

E. Proposed Metropolitan Study Commission for Allegheny County

This report may appropriately be concluded with a mention of a bill introduced in the 1951 session of the Pennsylvania legislature which specifically would deal with Allegheny County and the building, zoning and planning regulations within it. This bill, Senate Bill 759, would create a Metropolitan Study Commission for Allegheny County, consisting of fourteen members appointed

by the governor from nominations made by the Allegheny Conference on Community Development, the Pennsylvania Economy League, the Pittsburgh Chamber of Commerce, the American Federation of Labor, the Congress of Industrial Organizations, the Allegheny County Association of Township Commissioners, the Allegheny County Association of Township Supervisors, the Allegheny County Borough and Third Class City Associations, the City Council of Pittsburgh, the County Commissioners, the County Board of School Directors, the County Independent School District Association, and the Pittsburgh Regional Planning Commission.

The Commission would be required to meet at the call of the governor. It would make a study of building codes, housing, municipal improvements and any other matters appropriate to planning and development within the county including zoning.

Political subdivisions within the county would be required to cooperate with the Study Commission. The members of the Study Commission would get no compensation, but the commission would have the power to accept gifts, to raise funds by public subscription, and to employ clerical and technical personnel.

The bill would require that the commission make a report to the governor, the legislature and other groups affected on or before January 1, 1953.

This proposed Metropolitan Study Commission, although structurally somewhat different from the regional planning commissions which may be formed under the general county law, would operate in a very similar manner. Although a regional planning commission set up under present law could effect a similar study program, this bill if passed would at least provide additional recognition of the idea that Allegheny County could be benefited by a thorough, far-sighted, and unified plan of development and regulation county-wide. If the results of such a deliberate planning program should prove to be beneficial, other counties throughout the State of Pennsylvania might be prompted to follow suit.

APPENDICES

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

Note: Numbers in parentheses are references to pages in the main text of the report.

PART ONE. BUILDING CONSTRUCTION REGULATION

A. STATE STATUTES RELATING TO LOCAL BUILDING CODES

1. **Scope of Statutory Authority:** The Pennsylvania legislature has granted sufficiently broad powers of regulation to the local governments as far as the subject matter which may be regulated is concerned. However, many Allegheny County municipalities have failed to include in their building codes all the matters which they by statute now are empowered to cover.

Many county municipalities should adopt entirely new building codes which utilize more fully the powers granted by the legislature. (18, 19)

2. **Statutory Permission to Adopt Building Codes by Reference:** The statutes which allow all classes of municipalities to adopt building codes by reference are in general commendable ones. They are sufficiently broad to allow the adoption by reference of a building code which incorporates within itself by reference still another building code. The statutes do not, however, permit the local units by one enactment to adopt a model code so that future revisions of such model codes by the organizations promulgating them will automatically become part of the law of the adopting municipalities. (19-25)

One defect found in these statutes was that they state that all classes of municipalities except boroughs must publish their building ordinances, when adopted by reference, by means of a form approved by the Department of Labor and Industry, but in the case of boroughs the form must be one approved by the Department of Internal Affairs.

One state agency or the other should be charged with the duty of approving the form of publication of building ordinances of all classes of municipalities. (21, 22)

3. **Recitation of Statutory Authority by Building Ordinances:** Because of the remote possibility that repeal of a particular statute may be held to effect an invalidation of ordinances which recite that particular statute as their sole authority, the unnecessary recitation that an ordinance is based upon a particular statute should be avoided. (31, 32)

4. **Statute Requiring that Building Codes be Submitted to the Recorder of Deeds:** The most likely meaning of this act of 1949 is that it merely requires that the Recorder of Deeds shall file the ordinance copies submitted to him; the statute apparently does not require that the local building ordinances be transcribed verbatim into new record books as the Allegheny County Recorder of Deeds office has done. However, because the statute is not clearly drafted, an honest difference of opinion is possible.

Hence, if this statute is retained, the definition of compliance with this act of 1949 should be clarified.

The statute should also be amended to make entry in the Recorder's primary index the sole evidence admissible in court as to whether an ordinance has been filed or not.

Also, the act of 1949 should make plain the absence of any necessity of reenactment of a pre-existing unfiled ordinance in order finally to file it and place it again in force. (37-46)

However, municipal officials and legislators should re-examine the wisdom of these ordinance recording statutes. The possibility of more effective means of making building and zoning ordinances accessible should be considered.

At the time this report was being written, several items of proposed legislation had been introduced in the Pennsylvania legislature to repeal or amend these 1949 acts.

5. **Statutory Maximums on the Amount of Fines Which the Local Units May Impose:** By the Housing Act of 1937 the maximum fine which may be imposed by Pittsburgh has been raised from \$100 to \$500, as to building codes only. (25)

The \$500 maximum fine for violation of building ordinances allowed to boroughs and second class townships by the 1937 act has since that time possibly been again reduced to \$100 in the case of boroughs and \$300 in the case of second class townships by the 1947 and 1951 revisions of the Borough and Second Class Township Codes.

The legislative bodies of these classes may test the maximum without endangering the validity of an entire ordinance. An ordinance which imposes a fine higher than that which the courts find to be authorized will not be invalidated, and the fine may be recovered up to the limit found to be lawful.

But if the former 1937 maximum fine of \$500 is still desired for boroughs and second class townships, a clarification of the Borough and Second Class Township Codes is necessary to insure such a result. (26-31)

Third class cities and first class townships at present are held to a \$300 maximum penalty. If the higher maximum fine of \$500 is allowed to second class cities, and possibly also to boroughs and second class townships, then the maximum fines available to cities of the third class and first class townships for violation of their building ordinances should be raised by the legislature so that the maximum fine is the same for all classes of municipalities. The need for a deterrent in the form of a monetary fine does not vary with the size or class of municipality. (31)

7. **Statutory Power to Recover Penalties by Summary Proceedings:** A local municipality should be able to recover fines for the violation of building ordinances before aldermen or justices of the peace, rather than in the court of common pleas; an appeal to common pleas is available. The statutes regulating the jurisdiction of aldermen and justices of the peace clearly allow municipal fines up to \$300 to be recovered before such tribunals, but they do not clearly allow the recovery of fines up to \$500 in summary proceedings.

If the legislature wishes at least some classes of municipalities to be able to impose fines up to \$500, then the statutes governing the jurisdiction of aldermen and justices of the peace should expressly allow the recovery of these higher amounts in such summary proceedings. (127-129)

8. **Statutory Power to Seek Injunctions Against Violations:** Although statutory authority is not required to permit a municipality to seek the aid of equity courts in abating violations which constitute nuisances, the power to obtain injunctions against other building ordinance violations must be given expressly by statute. The present statutes adequately permit municipal officials to obtain injunctions against all violations. (129-131)

B. NECESSITY THAT BUILDING REGULATION BE EMBODIED IN A VALID ORDINANCE

1. **Necessity of an Ordinance:** Building construction regulations cannot be imposed without an ordinance which defines them. Both the statutes and the courts require that the local powers of building regulation be exercised by the enactment of ordinances. Nevertheless several municipalities in Allegheny County are enforcing building and plumbing regulation without the benefit of an ordinance.

Building regulation powers should be exercised only by and after the enactment of a proper ordinance. (33-37)

2. **Requirement that Building Ordinances Be Submitted to the Recorder of Deeds:** The act of 1949 states that ordinances which are not submitted to the Recorder in compliance with it shall be void.

The act not only requires that certified copies of building ordinances be submitted to the Recorder of Deeds, but also specifies that municipal officials must supply each ordinance with an index. If ordinances are rendered void because they lack an index, then all but a few building ordinances in Allegheny County are today "void and of no effect."

Because providing each ordinance with an index is not only advisable but also may be a necessary condition precedent to the very validity of building ordinances, all such ordinances certainly should be provided with an index or equivalent reference devices. (38, 39)

If any building ordinance which was originally enacted before the passage of the act of 1949 has not yet been submitted to the Recorder of Deeds, it should be reenacted by the municipality before being submitted, as a precaution to insure that its validity will be revived. This recommendation will continue to apply so long as the 1949 statute is not repealed, unless the Pennsylvania legislature passes several bills introduced in 1951, which would revive such void ordinances without requiring them to be reenacted. (44, 45)

So long as the act of 1949 is in force, all municipalities should submit newly-enacted building ordinances to the Recorder of Deeds promptly. (45)

3. **Judicial Tests of Validity of Building Ordinances:** Even though a building ordinance stays within the scope of subject matter authorized by statute, as most Allegheny County building codes do, it must also measure up to the judicial requirements of certainty, reasonableness and uniformity of application, in order to be valid. In general, building codes in Allegheny County meet the tests of reasonableness and uniformity of application, but some are open to criticism on the ground that they contain uncertain phrasing. (89-92)

C. GENERAL NEED IN ALLEGHENY COUNTY FOR A MODERN, ADEQUATE AND UNIFORM PATTERN OF BUILDING REGULATION

1. **Extent of Building Regulation Existing in Allegheny County:** Table A shows that 41% of the municipalities in Allegheny County do have a building ordinance of some sort and that those building ordinances, 53 in number, cover 76% of the county population as set by the 1950 census estimates. If Pittsburgh is excluded, then in the outlying municipalities only 57% of the population is covered.

All the municipalities in the county should have building construction regulation. (47)

2. Age of Allegheny County Building Codes: Table C shows that over the whole county 28% of the population, in county municipalities which do have building ordinances at all, is governed by ordinances more than 10 years old. Without Pittsburgh, among the outlying municipalities 68% of the population is regulated by codes over 10 years of age. By Table E, more than 15% of the 38 non-Pittsburgh codes analyzed exceed 25 years of age.

In some respects the pattern of building regulation in Allegheny County is more obsolete than in the nation as a whole. (47-50)

An encouraging aspect, however, is that many Allegheny County municipal officials at present are interested in or actually considering revision of their building regulation. (55, 56)

In general, the pattern of building code regulation is in need of wholesale modernization.

The obsolescence of Allegheny County building codes has been offset by amendments only to a slight extent. The subject matter of the amendments is fragmentary; their chief effect has been to clutter up the unity of the codes amended.

Future amendments will be improved as to subject matter if building inspectors are required to recommend substantial technical changes when needed; a future amendment should also be adopted with a view toward avoiding a destruction of the unity of the amended code. (50-53)

3. Adequacy of the Scope of Existing Building Ordinances in Allegheny County: About one-fourth of the ordinances concentrate on fire prevention to the exclusion of structural safety and other regulations affecting housing. About 36% of the ordinances, covering 26% of the population outside Pittsburgh, do deal with both fire protection and structural safety but these ordinances are still too narrow in their application to serve as the core of a broad program of housing betterment.

Even those codes which are adequate in coverage of subject matter are not sufficiently modern. (61-64)

4. General Need for Revision Because of Obsolescence and Inadequate Scope: Table D measures the resultants of the two factors of age and scope. Outside Pittsburgh, only 14% of the population are covered by codes which roughly are of sufficient scope to cover today's housing needs and which also are less than 10 years old. (56, 57)

5. Effect upon Uniformity of the Sources from which Existing Codes Have Been Derived: Some uniformity of a building regulation in Allegheny County has been achieved because the source of some building codes has been the earlier codes of other municipalities in the county; the use of this source has resulted from the effect of geographical proximity and personalities. However, because the common sources number not one but many, the pattern in the county as a whole is still not sufficiently uniform. (53-56)

D. POTENTIAL MEANS FOR ACHIEVING A PATTERN OF BUILDING REGULATIONS WHICH COVERS THE WHOLE COUNTY AND WHICH IS MODERN, ADEQUATE AND UNIFORM

1. Creation of a New Building Code System Within Present Statutory Authority: A solution may be found in the adoption by the local municipalities outside Pittsburgh of uniform national model codes. This approach is suggested because of its advantages of saving labor, time and money in the formulation of a code, because it is more likely to result in a better product, and because only through it can anything approaching countywide uniformity be obtained in the near future. (57-59)

2. Recommendation of Specific Model Code: Of the various model codes available, tentatively recommended for first consideration is the *Abridged Code* of the Building Officials Conference of America, formulated in 1949. (59) The advantages and weaknesses of this model code are discussed under the appropriate headings throughout the report. A comparative evaluation of its technical adequacy may be found at pp. 76-79.

E. ESSENTIALS OF ADEQUATE BUILDING CODES

1. Technical Content; Scope: The breadth of subject matter covered in a building code should embrace not only fire prevention and protection, but also structural safety, and also plumbing and health regulations where the state has not regulated such matters.

As already pointed out, the building code pattern in Allegheny County is too narrow in scope.

The recommended model code of the Building Officials Conference of America is adequately broad in scope. Although cities could not adopt it entirely because its plumbing and multiple dwelling regulations would conflict with the state statutes regulating such matters in the cities,

boroughs and townships could adopt it and thereby increase the breadth of their regulations. (61-66)

2. **Technical Content; Type:** Most codes in Allegheny County are the specification type which requires constant legislative amendment to save it from obsolescence, because it specifies measures, methods and materials in exact detail. The performance type, which states the results desired and omits details insofar as possible, is preferred because of its flexibility and adaptability to new methods and materials.

The need for adoption of performance-type codes in the modern sense is apparent in many Allegheny County municipalities. The *Abridged Code* of the Building Officials Conference is largely a performance code. (66-68)

3. **Technical Content; Inclusion of National Standards:** An adequate building code should employ the national standards of materials and methods which have been formulated by expert governmental and industrial bodies.

In Allegheny County outside Pittsburgh most of the codes which use national standards incorporate them by reference in the ordinance.

Giving the building code administrator controlled rule-making power to adopt current national standards which meet his approval is recommended as a method of inclusion of national standards, because it permits them to be used flexibly without the necessity of frequent legislative amendments to the code. (68-73)

4. **Technical Content; Flexibility in General:** Closely allied with the matters of type and use of standards is the problem of flexibility.

In Allegheny County outside Pittsburgh there are only scattered instances of true flexibility.

Whether a specification or performance type of code is in force, the building ordinance itself should contain a legally defined procedure for allowing the use of newly developed materials and methods. The approval of such alternative should be the province of the administrative staff, and its rulings should be preserved in the form of a continuing regulation. (73-76)

5. **Form; Draftsmanship:** A building code should be carefully drafted for the sake of clarity and neatness. The meaning of code provisions should not be left for the after-the-fact determinations of the courts. (81, 82)

In Allegheny County codes, the word "nuisance" at least has been used with a disregard for its correct legal meaning. Some county codes are carelessly published, as shown by the material submitted to the Recorder of Deeds. (85, 86)

The language of building codes should be unmistakably clear; the use of a "definitions" section in the ordinance helps. (82)

6. **Form; Organization:** Building codes may be organized either along the lines of subject matter dealt with or according to the type of occupancy regulated.

The particular choice of organization is unimportant so long as the plan chosen is followed consistently throughout. (82, 83) However, a code which is well-drafted at the outset can be reduced to a shambles by a series of indiscriminately constructed amendments.

Amendments should be drafted with one eye on the master plan of organization, then periodically incorporated into the published code by recodification. (83, 84)

7. **Form; Reference Devices:** A building code should be implemented by a convenient numbering system, table of contents, index, and appendix. (84, 85)

Most Allegheny County codes employ no means of references; only a few use a table of contents or an index. (87, 88)

8. **Coverage:** Building codes generally can legally relate only to buildings erected after the enactment of the ordinance. They may cover future acts done in connection with existing structures. They can require substantial changes in existing buildings only when there is a strong "police power" reason. (94-99)

Besides regulating the construction of future buildings, building codes can, and should embrace the following matters, relating to all buildings:

- a. Reconstruction of destroyed buildings
- b. Additions
- c. Alterations
- d. Major Repairs
- e. Change of Use
- f. Maintenance
- g. Unsafe Buildings
- h. Buildings Which Are Moved

F. ADMINISTRATION OF BUILDING CODES

1. **Permits:** Most Allegheny County municipalities use a building permit procedure, which involves the issuance of a permit if plans conform to the code, followed by inspection at various stages of construction.

In addition the occupancy permit procedure should be used. A final approval on completion of the work should be evidenced by an occupancy permit which serves to assure the builder that his work conforms sufficiently well to the code so that he will not be subjected to a penalty. (102, 103)

2. **Personnel and Administration in General:** Most Allegheny County municipalities employ a building inspector on a part-time fee basis. Participation by councils and secretaries in the administration may cause confusion and inefficiency. (102-105)

To require efficiency from the inspector under penalty as some Allegheny County municipalities do seems a fruitless procedure. Placing the cost of complaints about unsafe buildings upon the complainant, as some county subdivisions do, is also inadvisable. (108-110)

Preferably the building inspector should be paid a salary. The hiring of a joint building inspector by several neighboring municipalities might permit the joint building inspector to devote full time to the work. (105)

Whether such measures are taken or not, administrative efficiency can be improved by:

- a. The use of the "Controlled Material Procedure" contained in the *Abridged Code* of the Building Officials of America. (106, 107)
- b. An ordinance provision permitting the inspector to employ special technical advice when difficult problems arise. (107)
- c. Coordination of all housing inspection functions in one office; this may permit a middle-sized municipality to employ a full-time inspector. (108)
- d. A complaint procedure by which the municipality instead of the complainant assumes the cost of acting upon the complaints. (109, 110)

3. **Administrative Discretion and Rule-Making Powers:** Too broad a grant of discretion or rule-making power to the administrator of a building code may be held by the courts to be an unlawful delegation of legislative power. In practice the lawfulness or unlawfulness of any particular grant of discretion depends upon the circumstances surrounding the situation. An administrator may be given the power to determine whether or not a certain fact exists, but the formulation of

guides defining for the administrator's benefit the nature of the fact to be found is a difficult problem. In building codes, however, the problem is somewhat easier to solve because exact external standards are available to serve as a basis for administrative discretion; the internal standards in the law need not be detailed but need only refer to the external standards with reasonable precision. (110-117)

In Allegheny County a majority of the existing ordinances contain some grants of discretion to the administrators. Most of them are likely to be upheld. (117-120)

When the building code administrator is given discretion to determine whether or not certain vague facts exist, the device of enumerating a list of national authorities as standards to which the administrator may turn, as Pittsburgh's code does, is the method most likely to find approval with the courts. (117)

G. ENFORCEMENT OF BUILDING CODES

1. **Informal Enforcement Pattern in Allegheny County:** The local enforcement pattern in the outlying municipalities is often informal and non-legal (as distinguished from illegal) in nature.

Informal enforcement of building codes, although not to be frowned upon entirely, should be observed closely and measured from time to time against legal criteria in order to insure that the rights of the public and of the alleged violator are not being trod upon. (121-124)

2. **Fines:** The maximum fine prescribed by statute should be the same for all classes of municipalities. (124, 125)

3. **Separate Offenses:** After giving due notice to a violator, the municipality may consider each reasonably fixed period past which the violation is continued a separate offense.

In Allegheny County most ordinances make each day of violation a separate offense.

More fair and reasonable, however, would be a provision which made each failure to obey each separate notice of violation a separate offense. (125-127)

4. **Use of Summary Proceedings to Recover Fines:** The statutes now clearly permit fines up to \$300 to be recovered before a justice of the peace or an alderman. The statutes, however, allow second class cities and possibly boroughs and second class townships to impose fines up to \$500.

The statutes should expressly allow the recovery of the higher amounts by summary proceedings also. (127-129)

5. **Use of Injunctions:** Municipal authorities have always been allowed to obtain injunctions against violations which constitute nuisances; today by statute they may also seek injunctions for the abatement of violations which do not constitute nuisances. (129-131)

6. **Summary Abatement of Nuisances:** When a violation constitutes a nuisance in the legal sense, municipal authorities may abate it without resort to judicial proceedings. (131)

7. **Effect of Ordinance Declaring Non-complying Buildings to be Nuisances:** About 47% of the Allegheny County ordinances other than Pittsburgh's declare that buildings erected in violation of regulations shall be deemed nuisances.

Such declarations exceed the lawful powers of the local governments; they will not be given effect by the courts unless the noncomplying structure happens to be a true nuisance. Whether local governments should attempt to implement their program of regulation with unenforceable bluffs is questionable.

The only place in the building code where a nuisance declaration may be legal and advisable is in the clauses relating to unsafe buildings. If the ordinance properly defines what buildings are unsafe, construction sought to be abated under such clauses will probably meet the judicial definition of a true nuisance and will be legally subject to abatement. (132-135)

The question as to whether the state legislature can make certain things nuisances in the legal sense by merely declaring them to be such is unsettled in Pennsylvania. A first glance at certain Pennsylvania statutes gives the impression that the legislature has declared certain things to be nuisances which are not nuisances by judicial definition previously. However, a close examination of these statutes shows that the legislature has not declared that all buildings which violate a building code may be treated as nuisances. The Pennsylvania legislature has not attempted to change the common law definition of what is a nuisance. Municipal authorities, despite ordinance declarations to the contrary, may treat violations of their building codes as nuisances only if they really endanger the public safety, health and welfare. (135-139)

PART TWO. ZONING REGULATION

A. STATUTES RELATING TO ZONING ORDINANCES—POLITICAL SUBDIVISIONS OTHER THAN THE COUNTY

1. **Existing Pattern of Pennsylvania Zoning Enabling Statutes:** Because the statutes relating to all classes of municipalities are largely derived from a common model, the Standard Zoning Enabling Act drawn up by the Federal Government's Department of Commerce, they are fairly uniform. The powers and restrictions applicable to all classes of municipalities are similar. Only in lesser matters, such as enactment procedure, is there much variance. (148-154)

In addition to the zoning enabling acts dealing with general municipal zoning ordinances, there is also the Airport Zoning Act of 1945 which confers adequate power upon all political subdivisions, including counties, to regulate the height of structures surrounding airports. (154-157)

2. **Confused State of the Borough and Second Class Township Codes Relating to the Required Notice Period:** These two codes, in the sections relating to enactment of zoning ordinances generally, prescribe that the notice period preparatory to enactment of zoning regulations shall be at least "one week and not more than three weeks." However, the same codes contain other sections which state that a notice period of "at least fifteen days" shall precede the consideration of ordinances fixing the boundaries of zoning districts, or ordinances amending such boundaries. Yet the same statutes also state that the shorter one-week notice period "may" be employed "in amending . . . any of the provisions of the ordinance". (162-165)

The only way in which the sections may be read coherently together is as follows:

- a. Any ordinance, original or amendment, which contains any provisions setting or amending zoning district boundaries can be enacted only after a fifteen day notice period.
- b. An original ordinance which contains no provisions affecting district boundaries at all can be validly enacted only after a notice period of at least one week and not more than three weeks.
- c. The provisions which state that the short one-week minimum period may be employed in amending *any* ordinance provisions must be applicable only to amendments which do not affect district boundaries. If the amendment involves changes only in use, height, and area regulations and does not deal with district boundaries, then

the municipal legislature may at its election give one to three weeks' notice before enactment.

The legislature should clarify the borough and second class township statutes so that they are plainly susceptible of the above interpretations. (166)

3. **Difference in Number of Notices Required of the Various Classes of Municipalities:** Apparently boroughs and second class townships need publish only one notice, a sufficient period in advance of enactment of a proposed ordinance. First class townships must publish two notices; their statute says "once a week for two weeks." Third class cities must also publish two notices. On the other hand, second class cities need give only one notice, fifteen days in advance. (166, 167)

4. **Differences in Requirements as to Content of Notices:** The third class city, borough and second class township codes state that notices of proposed ordinances must contain a summary of the ordinance's provisions and a reference to where copies of the proposed ordinance may be found, and must be in a form prepared or approved by a state agency. No particular form of notice is required for the other classes of municipalities.

Such requirements, intended to insure that the notices will be informative, should be applied to all classes of municipalities. (167)

5. **Statutory Requirement that Zoning Ordinances, To Be Valid, Must Be Submitted to the Recorder of Deeds:** The conclusions and recommendations applicable to the building code counterpart of this statute are also applicable here:

- a. The definition of compliance with the act of 1949 relating to the submission of zoning codes to the Recorder of Deeds should be clarified; it should in unmistakable terms explain whether certified copies of ordinances are merely to be filed by the Recorder of Deeds or transcribed verbatim into record books.
- b. The act of 1949 should expressly make entry in the Recorder of Deeds' primary index the sole evidence admissible in court as to whether an ordinance has been filed or not.
- c. The statute should also be clarified so as to make plain the absence of a need for reenactment of a pre-existing unfiled ordinance in order finally to file that ordinance and place it again in force. (157-159)

Several bills, proposing amendment or repeal of this act of 1949, were

pending in the Pennsylvania legislature at the time this report was finished.

This act of 1949 will have no effect upon private transactions involving the sale of land subject to zoning ordinances. (159, 160)

B. EXISTENCE OF ZONING ORDINANCES IN ALLEGHENY COUNTY

In Allegheny County, including Pittsburgh, about 56% of the municipalities, 82% of the population, and 54% of the area is governed by zoning ordinances. If Pittsburgh is excluded from the computations, however, only about 68% of the population and 50% of the area has zoning.

The need of those municipalities which do not have zoning at present should be determined by a survey on a broad plane. (172, 173)

C. NON-LEGAL ASPECTS OF ENACTMENT AND AMENDMENT OF ZONING ORDINANCES

1. Public Participation in the Enactment of Zoning Ordinances: Because public participation in zoning regulation is markedly greater than in the case of building codes, the greatest problem is one of restraining and channeling the intense clash of interests so as to arrive at a far-sighted and coherent zoning plan.

Municipal officials should anticipate public interest in order to avoid hastily-enacted zoning legislation. After a zoning commission has made initial studies, public participation should then be obtained by supplementing the statutory notice requirements by radio broadcasts, postcards or handbills. Neighborhood meetings are also suggested. (170, 171)

2. Zoning Map: The zoning map serves as a visual center upon which public interest may focus; it is more amenable to discussion and change than textual drafts.

Therefore, the zoning map should be drawn up in tentative form before the drafting of the textual provisions begins. (171)

3. Amendments: Commendable are the Pennsylvania statutory provisions which require a higher vote in the legislative body for amendments if 20% of the property owners affected file a written protest. (168)

Frequent and ill-considered amendments to zoning codes should be discouraged if the original ordinance was drafted with a long-range plan in view. (171)

D. GENERAL CONTENT OF ZONING CODES IN ALLEGHENY COUNTY

1. **Definitions:** At least one zoning code in Allegheny County does not contain a definitions section, although most do. If definitions are not included in a zoning ordinance or if they are not made sufficiently full and clear, the job of clarifying the meaning of ordinance provisions is left to the courts. (174-176)

2. **District Classification:** In Allegheny County there is considerable variance in the patterns of use district classification. In setting up use districts, their boundaries should be fixed so as to avoid making one side of a main thoroughfare residential when the other side has an established commercial character. (176-178)

Planners should also avoid overzoning, which is the setting aside of more land for non-residential uses than necessary. It is unlikely, however, that such overzoning is prevalent in Allegheny County. (177)

Use districts of one municipality should not clash with the use districts of adjoining municipalities at boundary lines. Such clashes can be avoided only by joint consultation, or by giving the county zoning power over all land within the county. (178)

3. **District Explanation and Transition:** All zoning ordinances should contain, as some Allegheny County ordinances do, provisions explaining and detailing the district boundaries. (178, 179)

Zoning ordinances should also contain transition provisions to achieve coherency in the zoning requirements where district boundaries meet; such problems arise when one lot lies in two districts, where residential streets intersect commercial ones, and where rear yards or corner lots are situated on the line between use districts. Only the first of these problems has been provided for in Allegheny County zoning ordinances. (179-181)

4. **District Regulations:** Use regulations in the county are of course varied. About $\frac{1}{4}$ of the municipalities prohibit certain uses from being carried on anywhere within the municipality. Exceptions to use requirements are included in most ordinances, some of them conditioned upon approval by the board of adjustment. Most ordinances also set forth "accessory uses," uses which are allowable as incidental to residential uses; express demarcation of accessory uses in the ordinance is necessary if municipalities do not wish the ordinances to be subject to the judicial doctrine of accessory uses which the courts have applied where certain incidental non-residential uses have been tolerated by enforcement officials in residential districts over a period of time. (181-187)

Area regulations commonly appear in minimum lot sizes and yard requirements. In setting minimum lot sizes, local ordinances most commonly state minimum areas; only a few ordinances specify minimum lengths and widths in addition. All the local ordinances, however, contain provisions fixing yard depths or set-back lines. Only a few specify the percentage of space which must be left open on lots, which is another approach to the area problem. Most of the ordinances mention certain architectural features either to make them exceptions to the area requirements or to make clear that they shall not be allowed to diminish the open spaces required; about half of the ordinances except from the area requirements those lots which at the time of the enactment of the ordinance were too small to conform. (187-189)

A majority of the ordinances set maximum heights for buildings, most commonly in residential districts. However, local ordinances do not generally explain height regulations and exceptions in sufficient detail. (192)

5. **Airport Zoning Regulations:** No Allegheny County municipalities have enacted any airport zoning regulations to govern the height of structures located within the hazard areas surrounding airports. The advisability of such regulations should be examined by those municipalities which have airports located within their boundaries. (192-195)

6. **Off-Street Parking Requirements:** Only a few Allegheny County municipalities have included off-street parking space requirements in their zoning codes. The use of such requirements is highly recommended to relieve future traffic congestion problems in suburban shopping centers. (189-192)

7. **Legislative Provisions:** Ordinances in the county all contain some legislative sections dealing with interpretation, conflicts, repeals, amendments, and separability of provisions held invalid by the courts. Some of these ordinance provisions, such as those exempting public utilities from zoning regulations, are restatements of statutory provisions. (195-197)

E. CLARITY AND FORM OF ZONING ORDINANCES

1. **Clarity:** The problem of finding exact words is acute in zoning legislation. In order to avoid leaving the definitions of particular words to the after-the-fact determinations of the courts, every phrase which does not contain a widely-understood meaning should be explained in the definitions section of the zoning ordinance. (198-200)

If the words and phrases enumerated in the definitions sections are numbered, and if every time these words or phrases are used in the substantive text they are accompanied by a reference number corresponding to their number in the definitions sections, the full meaning will be called to the attention of the citizen examining the ordinance to determine his rights and duties. (201)

2. Organization: Separately-designated Use, Height, and Area Districts: Some ordinances in Allegheny County designate two or three different sets of districts with varying boundaries, a different set of districts for each type of regulation—use, height, and area. In a few cases separate sets of districts have been created even though the boundaries of the use, height, and area districts are coterminous.

Wherever possible the ordinance, for the sake of simplicity and ease of understanding, should present only one set of districts. Such a simplification will not be possible, however, if use, height and area conditions have crystallized in overlapping patterns prior to the enactment of zoning regulation. (201, 202)

3. Organization: Placing of Provisions Within the Ordinance: Zoning ordinances should distinguish between use exceptions which are true exceptions depending on board of adjustment approval and those which are merely additional permitted uses; most local ordinances do not make such a distinction in their format. (202, 203)

Most local ordinances place boundary explanation sections among the administrative provisions; they should be included with the district classification provisions. (203)

Provisions dealing with the exemption of buildings for which permits have been issued at the time of the passage of the ordinance are properly non-conforming use provisions rather than “interpretation” provisions as most local ordinances class them. (203)

4. Means of Reference: Zoning maps are now required by statute. They should be carefully drawn up because many persons will rely upon them rather than upon the ordinance’s textual provisions for the determination of district boundaries. (203, 204)

Indexes are non-existent and unnecessary in Allegheny County zoning ordinances; they would be very difficult to devise. But tables of contents should accompany zoning ordinances; only two of the ordinances studied use them. (204)

5. Recodification of Amendments: As in the case of building

codes, amendments to zoning codes should be recodified periodically to avoid confusion. At least six municipalities in the county have codified their amendments to some extent; a few others provide summaries or digests of the zoning regulations as amended. (205)

F. SALIENT LEGAL PROBLEMS IN ALLEGHENY COUNTY ZONING ORDINANCES

1. **Justifiable Purposes of Zoning Ordinances:** The statutes and the courts require that the purposes of zoning ordinances be related to health, safety, morals, or the general welfare. (206)

Aesthetic considerations cannot serve as the sole basis for a zoning requirement, nor can zoning regulation be challenged on grounds that it hampers aesthetic effect. However, aesthetics may be an incidental purpose, and the courts indicate that aesthetic considerations bear some weight with them in close cases. (207, 208)

Whether or not the support of economic values of existing property can serve as the sole justification for a zoning restriction is a question as yet not definitely decided. Zoning ordinances which imposed a minimum cost requirement on dwellings have been held invalid. (208, 209)

Two Allegheny County zoning codes contain minimum interior first floor area requirements. Similar requirements have been upheld in a Pennsylvania Superior Court decision but declared invalid in other states. Whether or not they can be justified upon grounds of health and protection of economic values of existing property remains to be decided. (209-214)

The protection of the economic values of existing property could best be handled by broad regional zoning on a county-wide scale. (213)

2. **Reasonableness of Operation of Zoning Ordinances:** The courts require that zoning ordinances be reasonable in their operation. Regulations in residential districts are treated liberally by the courts and upheld unless clearly and arbitrarily unreasonable. (214)

Many Allegheny County ordinances contain non-districted use prohibitions, which exclude certain enterprises from being carried on anywhere in the municipality and do not merely relegate them to one district. The courts will probably not invalidate them routinely but will consider the reasonableness of their operation in the light of the particular facts of each case. (215-218)

3. **Uniformity of Operation of Zoning Ordinances:** To be legal, zoning ordinances must, within each district, be uniform in their application to like matters. Both the statutes and the courts have stated this requirement, which involves considerations of constitutionality.

Some ordinances in Allegheny County display a patent lack of uniformity of operation. If litigated in the courts, they could be held invalid because they attempt to impose special use requirements upon particular lots in a district or upon a few streets in a district. (218-222)

Many Allegheny County ordinances contain provisions which fix set-back building lines (front yard area requirements) according to the line established by a percentage of previously-existing buildings in a block. This approach to set-backs, because it is likely to result in a great lack of uniformity between the various blocks in a district, has clearly been held invalid by the Pennsylvania Supreme Court. Nevertheless such regulations are still being enforced in the county. (222-226)

4. **Application of Zoning Regulations to Non-Conforming Uses in Existence Before the Passage of the Ordinance:** All zoning ordinances, in order to be complete, should contain provisions dealing with:

- a. Continuation of Uses Existing When Ordinance Passed
- b. Completion of Previously Authorized Construction
- c. Structural Alterations to Non-Conforming Uses
- d. Permission to Strengthen Unsafe Structures; Repairs to Non-Conforming Uses
- e. Restoration of Destroyed Buildings; Replacement of Non-Conforming Uses
- f. Extensions to Non-Conforming Uses Not Involving Structural Alterations
- g. Change of Non-Conforming Use
- h. Effect of Change of District Classification
- i. Discontinuance or Abandonment of a Non-Conforming Use

In addition, local zoning ordinances might include provisions which require the cessation of non-conforming uses after a certain period arrived at by a formula which would allow for the amortization of the investment in the non-conforming use. Preferably, the legislature should give express permission to all local units to enact such provisions; to date, legislative permission has been given expressly only to county governments. (226-238)

G. ADMINISTRATION OF ZONING ORDINANCES; FUNCTIONS OF THE BOARD OF ADJUSTMENT

1. **Administrative Personnel:** If a municipality is enforcing both a building and zoning code, the building inspector may also appropriately serve as the administrative officer for the zoning regulations.

A majority of the municipalities in Allegheny County already use such a plan. (239)

2. **Administrative Procedure:** Applications for a building or occupancy permit in connection with zoning regulations should be initiated by the submission of plats and plans to the administrator. Where the construction of a new building or alteration is involved, the zoning permit procedure should be linked with the building code procedure.

A majority of the municipalities in Allegheny County conform to this procedure. (240)

3. **Board of Adjustment; Variances:** The power of the board of adjustment to grant variances from the minor regulations of the zoning code can be exercised only when there are real, practical difficulties in the way of carrying out the express provisions of the ordinance. Ordinarily the courts have not permitted the granting of a use which the ordinance clearly prohibits; the legislative body, not the board of adjustment, must authorize changes of use classification. (242-245)

4. **Board of Adjustment; Special Exceptions:** Special exceptions are those matters which the zoning ordinance allows on condition that the approval of the board of adjustment is secured. Many Allegheny County ordinances also make special exceptions conditioned upon the additional requirement that the consent of neighboring property owners is obtained; although some states have declared through their courts that such a requirement is unconstitutional, it has been upheld by the United States Supreme Court and by the Pennsylvania Supreme Court provided that the use thus conditioned is one sufficiently offensive that a court of equity would consider enjoining it at the suit of private persons, aside from the zoning regulations. Judged by this criterion, the provisions in ordinances in Allegheny County are generally valid. (245-248)

5. **Appeals to Common Pleas Court from Decisions of the Board of Adjustment:** The statutes provide that appeals may be taken to common pleas from the boards of adjustment. Every zoning ordinance should expressly require that the board of adjustment make a record of the testimony and proceedings before it so that the record may be available whenever an appeal is taken to the court of common pleas. (249-250)

H. ENFORCEMENT OF ZONING ORDINANCES

1. **Fines:** By statute, third class cities and first and second class townships may impose fines up to \$300, but second class cities (Pittsburgh) and boroughs are limited to a maximum of \$100. The higher maximum should be available to all classes of municipalities. (252)

2. **Injunctions Against Zoning Ordinance Violations:** Where a violation of a zoning ordinance constitutes a nuisance, the municipal officials need no express statutory authority to go into court to obtain an injunction.

However, express statutory power is required in order to seek injunctions against violations which do not amount to nuisances. Such statutory authority has been given third class cities, boroughs and townships but not second class cities. The legislature should add to the zoning powers of second class cities permission to seek injunctions against any and all zoning ordinance violations. (252, 253)

I. **ACHIEVEMENT OF INTEGRATION IN ZONING: COUNTY ZONING UNDER STATUTORY AUTHORITY**

1. **Necessity of Integration in Zoning:** Because the zoning power is split up among all the local subdivisions of the county, zoning regulations may clash at municipal boundary lines unless zoning ordinances are enacted after joint consultation. Furthermore, subdivided zoning power may tend to result in an inequitable allocation of land area to the various uses over the county. Even if the total areas allotted to each type of use should happen to balance properly with the actual needs countywide, there is no assurance that the location of use areas will be suitable.

Equitable distribution of use areas throughout the county could more likely be achieved if the zoning power were removed from the local subdivisions and placed entirely in the county administration. This solution is a long-range one. (254, 255)

2. **Present County Government Zoning Powers:** The powers given the county government in 1937 in general outline resemble the zoning powers of the political subdivisions; however, county zoning at present may be enacted to affect only the areas outside of cities, boroughs and first class townships. Allegheny County has no county zoning ordinances.

The county government should exercise the zoning power which it presently has, in order to make a beginning to the achievement of county-wide integration in zoning.

At the time this report was written, bills had been introduced into the Pennsylvania legislature to amend the laws so that county governments could enact zoning ordinances governing *all* areas of the county in any municipality of any class which has not enacted zoning ordinances of its own. (255-259)

3. **Cooperative Zoning Throughout the County; Regional Planning Commissions:** Sufficient statutory authority exists so that regional planning commissions may be formed to which the participating counties and municipalities may delegate the powers presently exercised by their respective zoning (planning) commissions.

A regional planning commission so constituted could propose a uniform zoning plan for the entire region; the enactment of the respective portions of such a plan would still rest with the legislative bodies of the cooperating county and municipal governments.

Until the counties are given mandatory power to zone all the area within their boundaries, the formation of a cooperative regional planning and zoning commission, whose proposal would be enacted into law by the several participating authorities, can do much toward eliminating the boundary clashes, lack of uniformity and poor land use distribution which exists today. (260-262)

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